



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL
COMMISSIONER BISSETT**

AM2014/190

s.156 - 4 yearly review of modern awards

**Transitional Provisions – Accident Pay
(AM2014/190)
Black Coal Mining Industry Award 2010**

[MA000001]

Sydney

10.02 AM, THURSDAY, 5 OCTOBER 2017

PN1

DEPUTY PRESIDENT KOVACIC: Good morning, everybody. Can I please take appearances.

PN2

MR Y SHARIFF: May it please, my name is Shariff. I seek permission to appear with my learned friend Mr Moroney. I'm instructed by Mr Sebbens and Ms Lloyd.

PN3

DEPUTY PRESIDENT KOVACIC: Welcome, Mr Shariff.

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MR SHARIFF: I'm not sure, your Honours, we have actually addressed you on section 596 yet.

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DEPUTY PRESIDENT KOVACIC: I don't think you have, but I was operating under the assumption that permission had previously been granted in terms of proceedings. Nonetheless, it might be worthwhile just if you were to address 596.

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MR SHARIFF: Yes.

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DEPUTY PRESIDENT KOVACIC: Thank you, Mr Shariff.

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MR SHARIFF: We say that there is sufficient complexity in the matter given that it involves an examination of historical provisions that have existed in the award and the intersection between those provisions and some earlier Full Bench authority that has examined accident pay provisions, as a result of which we say there is sufficient complexity in the matter that your Honours would be assisted by the legal representatives. Of course we would endeavour to keep the matter as short and simple as possible, but in the confines of the complexity that has arisen.

PN9

DEPUTY PRESIDENT KOVACIC: Thank you, Mr Shariff. Just one question I might ask while you're on your feet: I would take it that you would have no objection to the unions being represented in these proceedings.

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MR SHARIFF: Of course, no. That was the other point to raise. As a matter of fairness both sides are represented by counsel and have each got legal representatives, although my friend has got internal legal representatives from his two clients.

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DEPUTY PRESIDENT KOVACIC: Thank you. We might just hear from Mr Fagir and then we'll deal with the issue.

PN12

MR I TAYLOR: If it please the Commission, my name is Taylor, with Mr Fagir. We seek permission to appear for the three unions who are objecting to the application. We say that the Commission would grant permission to appear to both parties given the complexity of the mater. We have no objection to the employer parties being so represented.

PN13

We suggest and submit that this is an appropriate matter for permission to be given, if it hasn't already been given, which was something that - like your Honour - we were not entirely clear before we stood up, but to ensure there is no issue about that, we think it's appropriate to make the application afresh.

PN14

DEPUTY PRESIDENT KOVACIC: Thank you, Mr Taylor. Any other appearances? No? Thank you for those submissions. The Bench is satisfied that the grounds in section 596(2)(a) have been made out and, in those circumstances, is willing to exercise the discretion available to the Commission to grant you permission to represent your respective clients. We will proceed on that basis.

PN15

MR SHARIFF: If it please.

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DEPUTY PRESIDENT KOVACIC: One question I was going to ask: are there any administrative matters that parties wanted to raise before we turn to opening submissions?

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MR SHARIFF: Perhaps I can wrap this into administrative matters and opening. There have been some discussions between the relevant representatives in terms of the conduct of the proceedings. My side has two witnesses; Mr Gunzburg and Dr Adam. As your Honours might be aware, because of unavailability, Dr Adam can't give evidence on these two allocated days. That means my side's only witness available is Mr Gunzburg. My friends wish to cross-examine him. I anticipate, from what I'm told, that their cross-examination will be an hour to two hours potentially. I'm not sure, but in that range.

PN18

I have, through my instructors, given an indication to the union parties - they have three witnesses as I recall it - that we don't require any of the unions' witnesses to attend for cross-examination. We do have some very brief objections to their evidence which I can hand up the schedule at the appropriate time. The result of that is I think other than the evidence of Mr Gunzburg today that will be, as we anticipate, the end of the proceedings.

PN19

I don't imagine we will need tomorrow, but what it does mean is that when we return for the date in November to deal with Dr Adam's evidence, our preference - that is my side's preference - would be once we conclude that evidence, we move straight into closing submissions to avoid any further delay. I thought we should

raise that with you now because of commitments elsewhere and the allocation of the hearing date tomorrow.

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DEPUTY PRESIDENT KOVACIC: That sounds a reasonable approach. It certainly would have been perhaps beneficial for the Bench to be advised of that in advance of this morning.

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MR SHARIFF: Yes.

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DEPUTY PRESIDENT KOVACIC: Given that it does create some inconvenience for members of the Bench, but, be that as it may, that's where we're at at the moment. Mr Taylor, is there anything you wish to say?

PN23

MR TAYLOR: No, thank you, Deputy President.

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DEPUTY PRESIDENT KOVACIC: Thank you.

PN25

MR SHARIFF: In terms of opening submissions, your Honours I'm hopeful have received my side's primary submissions and then my friends' submissions, and our submissions in reply. I don't wish to agitate anything further than that in terms of opening. I think it's fairly clear that the parties are diametrically opposed on the critical issues. Our friends seek to reduce our case to a very short point. We say that's not quite right. We say the purpose of the review is to examine whether the award in a relevant sense provides for a fair and relevant minimum safety net.

PN26

One would take into account recent Full Court authority from the Federal Court as to the nature of the statutory task about that question and we say one would also be informed by recent decisions of other Full Benches that have examined the test cases - in the penalty rates case and the like - as to how one approaches the task. The essential question is one about whether the entitlement of 78 weeks, as it's contained in the accident pay provisions, reflects a fair and minimum safety net.

PN27

DEPUTY PRESIDENT BULL: Mr Shariff, can I just ask is there somewhere in the documentation who your client represents - - -

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MR SHARIFF: Yes. I should indicate that I act for each of the entities that have been associated together as the Coal Mining Industry Employers Group. I had understood that there was correspondence sent to the Commission that identified each of the entities.

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DEPUTY PRESIDENT BULL: There may be, yes.

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MR SHARIFF: But I can attend to that during the course of the morning. We can provide you with - - -

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DEPUTY PRESIDENT BULL: Just roughly, are you able to tell us whether you represent 8 per cent of the industry or - - -

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DEPUTY PRESIDENT KOVACIC: Can I just perhaps make a suggestion and I think it was outlined in - it might have been I think either in the correspondence or Mr Sebbens' witness statement in the context of dealing with the unions' application for an order to produce in terms of who are the members of the CMIEG, but I think the question that Deputy President Bull poses in terms of - well, the proportion of the industry which those members comprise would be beneficial.

PN33

If you could take it on notice, Mr Shariff, and whether it's possible to provide it today or, if not today, sort of by the 24th - - -

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MR SHARIFF: We'll undertake to do that.

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DEPUTY PRESIDENT KOVACIC: Yes.

PN36

MR SHARIFF: I'm told there are 14 employers. They reflect all the major operators which together in respect of the black coal mines in Australia would represent the vast majority of the operators of those mines, but I will attend to that task.

PN37

DEPUTY PRESIDENT KOVACIC: Thank you.

PN38

DEPUTY PRESIDENT BULL: One reason I ask - and you may not have any instructions on this, Mr Shariff - is that other than your clients' members, nobody else in the coal industry is here today. Does that mean they're not interested or they don't know about it or what?

PN39

MR SHARIFF: I think the answer to that question is in part that my understanding is that the Australian Industry Group has filed supporting submissions to the position that my client advances.

PN40

DEPUTY PRESIDENT BULL: That's true, yes.

PN41

MR SHARIFF: What I don't know, Commissioner, is how many members the Australian Industry Group has in the sector, so I'm not sure I can immediately answer that question. To the extent that there are any other major operators of the black coal mines in Australia, I would be surprised if they didn't know about the fact of the matter.

PN42

DEPUTY PRESIDENT BULL: Yes.

PN43

MR SHARIFF: I would have thought that between my 14 clients and AiG, we would probably represent the vast majority if not virtually all the operators. I don't know the answer to that for sure, but we will undertake - - -

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DEPUTY PRESIDENT BULL: Thank you.

PN45

MR SHARIFF: I think I was just saying by way of short opening that I didn't wish to expand on what we have said in writing, but the critical issue is whether the award in the relevant sense provides for a fair and relevant minimum safety net. There is an issue I anticipate that's going to be raised, as to the extent of injuries in this industry; whether there is any differential between this industry and other industries - sorry, in relation to both the frequencies of injuries, their duration and whether in those respects they're different to other industries so as to warrant differential treatment.

PN46

There is, I anticipate, also an issue - having read the submissions of all parties - the question about loss of entitlements as it's put; whether there will be a reduction in benefit. We say something about that. We say there isn't actually a reduction in benefit unless you are injured, but that's not to say that there won't be a reduction as between the benefit that would exist today and if the variation is made. There would clearly be a change, but whether that results in anyone being out of pocket is a different issue. We address that in writing.

PN47

There are likely to be other issues. I anticipate Mr Gunzburg's evidence and Dr Adam's evidence will be largely relating to the statistical data such as is available. Of course we have made the point that the data in relation to these types of matters is largely kept in New South Wales by Coal Mines Insurance, which is the statutory regulator for the scheme.

PN48

In Queensland the relevant department has maintained some information, but the two entities maintain information of a different type, so that the information we might have been able to obtain from Coal Mines Insurance in relation to the New South Wales position is going to be of a slightly different nature to the information we have been able to obtain from the Department of Mining.

PN49

My recollection also is - and perhaps this crosses over with a point, Commissioner Bull - it might be related to the issue you're raising with me that between New South Wales and Queensland we are likely to find that that is where the vast majority of black coal mines are located. There are certainly some I think in Tasmania, between New South Wales and Western Australia of course, but between New South Wales and Queensland we're likely to find the vast majority of mines.

PN50

This data, such as it is available, we have tried to get it from two repositories of places that would have data of such type and we would point out that much of that data, which I suspect is going to be in contest and the subject of scrutiny - there isn't any rival case put as we see it. The case that has been put on an evidentiary basis from the unions is to say, well, the black coal mining industry is an inherently dangerous industry. It's filled with risk.

PN51

There are some slightly different risks in the black coal mining industry, but there isn't any, as it were, data to challenge things such as the frequency of injury rates or the duration of periods of time away from work, if I can put it that way.

Perhaps that's a matter we will all address in closing in due course, but I think we all know what the parameters of the debate are. We have slightly different views on what the statutory task is and how to approach it. Unless there's anything further I can assist with by way of opening, I was proposing to call Mr Gunzburg.

PN52

DEPUTY PRESIDENT KOVACIC: I will just give Mr Taylor the opportunity if there is anything he wishes to say by opening remarks.

PN53

MR TAYLOR: The case that the employers put forward is effectively that a 37-year standard accepted by this Commission when it made the award in 2008 and then when it confirmed the provision in 2014, and then again by two members of this Bench in February 2015, is now one that should be altered because of the August 2015 Full Bench decision that I'll refer to as the accident pay decision. The current clause was stated to be a clear national standard for this particular industry, at paragraph 71 of the February 2015 decision.

PN54

The Commission is well aware of the repeatedly stated importance of the stability of the award system such that one would not make an alteration to the award unless there is a proper case made out to do so. Whilst, as Mr Shariff said, his client seeks to put forward a variety of statistical material, we will ultimately submit that nothing in that material suggests there has been any change since the award was made in 2008 and certainly none since the award provision was confirmed as a clear national standard for this industry in February 2015.

PN55

This entire case is brought forward on a misunderstanding of what the Full Bench in the accident pay decision determined. It's based on a misunderstanding that that case fixed a maximum of 52 weeks, when the Bench quite clearly said in the

relevant paragraph that is relied upon that that is something the Bench stated to be appropriate if it was inserting into an award by arbitration a provision that a different approach is to be taken when one is considering an award which already contains a relevant provision, as here, as it has for 37 years.

PN56

When one reads the employers' reply submission, it becomes patently clear that there is no basis for this application relied upon other than that paragraph from that Full Bench decision. In particular, if one is examining the impact of the change, it doesn't appear to be in contest that the impact will fall upon seriously injured workers. We will come to this, but in effect the impact of their change is to change the amount of accident pay that can be accessed by a worker who has been off work for more than 26 weeks.

PN57

Whilst there is a 52-week cap that's highlighted as the purpose of this claim, in fact the impact of the claim buried in the detail is the impact of changing the clause so that the personal leave rate doesn't extend for 39 weeks, it extends for only 26 weeks. That 13-week difference translates to tens of thousands of dollars for an injured worker. This is someone who wasn't injured in their own time. They were injured at work. They are now trying to maintain their lifestyle and as a direct of that injury at work, the suggestion is that their income should be reduced by something in the order of 40 per cent over the 78 weeks.

PN58

Now, that doesn't appear to be in contest. That is the effect of what the employer is claiming. Nor do the employers appear to point to any reason why they need the change; that there is any financial advantage to them that they can point to. Nor do they point to, with respect, any of the factors that this Commission will take into account pursuant to section 131 as being relevant factors that would support such a change, except for one.

PN59

They suggest that lowering this entitlement will somehow improve bargaining and yet there seems to be an acceptance on the evidence that the clients in question, to the extent to which there are currently no enterprise agreements, take an approach in respect to such employees of intransigence in bargaining such that one can't imagine that because this entitlement is lowered, that they will start agreeing to make enterprise agreements. They don't want enterprise agreements and so I can't imagine how it could improve bargaining to lower this entitlement.

PN60

Some reference in the submissions of the employers is made to the decision of the Full Bench as part of the same four-yearly review - the potentially never-ending four-yearly review - to alter the redundancy provision in this award. Now, one has to understand that case was being argued in a quite different context. The Bench there had identified that part of that clause, by dint effectively of law, had been varied in a way that benefited employees so that it was effectively - there was a change, was ultimately the way they viewed it. As a result, it was considered appropriate to, in effect, make a countervailing change. There is no

change here. There is no upside here that is to be balanced against the change that is being sought by the employer.

PN61

Mr Shariff has identified, correctly, that part of our case is that this is a unique industry from a safety accident context. It is a unique industry. It has very unique and different ways that it is dealt with and that becomes clear from the evidence. There is separate legislation that deals with work health and safety. There is, as Mr Shariff identified, a completely separate insurer that insures in New South Wales for both workers compensation and accident pay. It's compulsory. Every employer has to use them.

PN62

The very nature of underground mining has unique characteristics that one won't find in the average workplace. We rely in part on the decision of the New South Wales Commission in 2004 of Grayson DP, where an application was made for a common rule award for accident pay in circumstances where there was an increasing proliferation of employers who were not respondent to the then federal award. Grayson DP concluded that there were unique aspects to this industry which made it appropriate for there to be a state award which reflected the federal conditions and pointed to a series of those, and we would say that none of those are any different today than they were then.

PN63

Ultimately, as I said, their case rests on this notion that this Commission has determined some sort of standard and this clause sits above that standard. That has a couple of problems, one of which is that the provision of 52 weeks is 52 weeks at the personal leave rate. This award only has 39 weeks at the personal leave rate. Indeed, there is actually lower amounts that are paid under this award.

PN64

The second problem is just a more fundamental problem of the approach to modern award making. This Commission has said more than once the approach to making a modern award is not one of setting a single set of conditions that apply to everyone. It's not an approach of lowest common denominator, where any party who can point to the fact that an award has a different condition than everyone else can say on that basis it should be altered. If that were the case, there would only be one modern award for all employees.

PN65

Each award has come to the state it is through a long history. It is ultimately a package of conditions that have developed over time and have been determined to be an appropriate minimum standard for that industry. This Commission has said more than once that this provision is the appropriate minimum standard for this industry and so my friend has to convince you that there is something that would lead you to take a different view. We say that he needs to point to something more than the existence of a decision which says that in respect of other awards when they were being arbitrated, rather than continuing existing provisions - that they should not have a provision of more than 52 weeks.

PN66

Ultimately we will say that the Commission will be satisfied that this remains an appropriate national standard for this industry and that this applicant has not made out a case for altering it.

PN67

DEPUTY PRESIDENT KOVACIC: Mr Shariff?

PN68

MR SHARIFF: Yes. Just before I call Mr Gunzburg, as I indicated we are diametrically opposed on a number of critical issues. One of them is the statutory task. In the Full Bench's decision in the penalty rates case, the Full Bench expressly rejected a contention that was put by the unions that an applicant for variation to a modern award needed to show a material change in circumstances. There was an absolute rejection of that contention by the Full Bench.

PN69

Secondly, the Full Bench accepted that it adopts a cogent reasons test. That is a test that, in the absence of the principles of precedent and stare decisis in this jurisdiction, is a test that has been erected as a matter of convention that provides that a subsequent Full Bench doesn't lightly depart from an earlier Full Bench decision unless there are cogent reasons for doing so. As we will endeavour to explain in our closing submissions, the erection of the cogent reasons test rests on a premise that there has been an earlier determination of the merits. That is, a determination of the merits of the particular issue.

PN70

In the penalty rates case itself, one of the applicants - the Restaurant and Catering Industry - had part of its claim rejected as part of the, if I can call it, four-yearly review applications because part of its claim was simply a claim that reflected an embodiment of a claim that it had put as part of the two-yearly review and was accepted in part; another part. In that respect the Full Bench in the penalty rates case said that the Restaurant and Catering Industry had not established cogent reasons to depart from its earlier determination because there had been a determination on the merits.

PN71

A very major suppressed premise in much of what my friends say in their written submissions and what they have addressed orally this morning, is that this Commission has determined the merits of accident pay provisions as they're contained in the black coal mining industry. We say there is just no factual basis for that. The last time that that particular issue, we say, was properly considered was not by this Commission or its predecessor, but the Coal Industry Tribunal in 1981.

PN72

The force of our case is to say point to the evidence, such as it is available from objective sources - to point to the myriad of changes that have occurred since 1981, both in the nature of the industry but more specifically in relation to safety management and injury management, the frequently of injury rates and the like, to point out that there has not been any examination of the merits since then and

there has been a change since then. Not that we embrace any idea that there is such a test, but that was the last time one actually examined the merits of it.

PN73

My friends say in their written submissions that the Full Bench, as part of the 2015 process relating to the removal of sunset provision, examined this award. We reject that. We have addressed that in writing and we will of course have to take up the cudgels against my friend's submission in relation to the particular point he raised about the 52-week standard which was established in that other case in respect of other awards; bearing in mind in other awards where that had included an accident pay entitlement of 104 weeks which had been brought to 52 weeks.

PN74

We will have to explore that. We will have to go through that Full Bench decision with close detail in closing submissions, but I thought I should just reply to what my friend has said because we do have a very different approach from which we come in terms of what the statutory task involves.

PN75

DEPUTY PRESIDENT KOVACIC: I think that's apparent on the surface of the written submissions, anyway, Mr Shariff.

PN76

MR SHARIFF: Yes. Thank you.

PN77

DEPUTY PRESIDENT KOVACIC: As well as the oral submissions this morning.

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MR SHARIFF: Yes, may it please.

PN79

DEPUTY PRESIDENT KOVACIC: Thank you.

PN80

MR SHARIFF: If there are no further questions, I would propose to - sorry.

PN81

DEPUTY PRESIDENT BULL: Mr Shariff - it may well be contained in the documentation I have here. I haven't seen it - what was your client's approach to the establishment of the 2010 award in respect to accident pay?

PN82

MR SHARIFF: Could I just have a moment, Commissioner? I'm being told - and perhaps it's going to be a matter of contest, like everything else - that there was no specific examination given by either party to accident pay, much like with other provisions, and we will have to take your Honours I think to the 2010 award modernisation decision which might indicate in some small paragraphs what was done in relation to consolidation of creation of this award. My understanding is

that there wasn't an issue taken at that point in time. In other words, I think the award was simply just made by consent.

PN83

DEPUTY PRESIDENT BULL: Yes, but it having been made by consent, it would seem to indicate that your clients would have been satisfied and that that was reflective of the industry standards at the time.

PN84

MR SHARIFF: I don't think I can say that there was that level of consideration given to the matter, I think in fairness.

PN85

DEPUTY PRESIDENT BULL: Do you have any instructions as to why there was a transition provision put in the award for the accident pay?

PN86

MR SHARIFF: I think it was a requirement, from recollection. I will have to look at why a particular sunset provision was included, but my recollection is that the sunset provision is included in a number of awards - - -

PN87

DEPUTY PRESIDENT BULL: Yes.

PN88

MR SHARIFF: - - - to preserve entitlements for a period of five years with a diminishing return in respect of some entitlements, but in respect of accident pay I just think it was a sunset provision, in which case we will submit that people understood - as became apparent in the last Full Bench that considered the accident pay provisions - that the accident pay entitlement was going to be up for debate at some point in the future, with the sunset clause being removed.

PN89

There has been consideration given to the removal of the sunset clause and whether, notwithstanding the removal of the sunset clause, the entitlement as it existed previously should continue in other awards where a similar conclusion had been reached, where similar awards have been made with consent or without any party turning their mind to the particular entitlement.

PN90

DEPUTY PRESIDENT BULL: Thank you.

PN91

MR SHARIFF: Thank you. Unless there were any further questions, I was proposing to call Mr Gunzburg.

PN92

DEPUTY PRESIDENT KOVACIC: We will call Mr Gunzburg. Thank you.

PN93

THE ASSOCIATE: Please state your full name and address.

PN94

MR GUNZBURG: David Maurice Gunzburg, 370 Highett Street, Richmond.

<DAVID MAURICE GUNZBURG, AFFIRMED [10.34 AM]

EXAMINATION-IN-CHIEF BY MR SHARIFF [10.34 AM]

PN95

MR SHARIFF: Your full name is David Maurice Gunzburg?---That's correct.

PN96

Your business address is Highett Street, Richmond, in Victoria?---That's correct.

PN97

Mr Gunzburg, you have prepared two statements for the purpose of these proceedings. The first is dated 24 February 2017?---Yes.

PN98

The second statement of David Gunzburg, dated 18 August 2017?---Yes.

PN99

I understand you wish to make one correction to the second statement?---That's correct.

PN100

Could you just identify what that correction is?---Yes. In paragraph 5, the statement says currently:

PN101

Figure 2 also represents the percentage of the length of periods of accident pay for each year from 1995 to 2016 in bar chart form.

PN102

That should read "the number of incidents of accident pay for each year from 1995 to 2016". The bar chart shows the actual number, not a percentage representation of them.

PN103

Are there any other corrections you wish to make to the two statements?---No.

PN104

Do you say the contents of those statements are true and correct to the best of your knowledge, recollection and belief?---Yes.

PN105

I tender - I'm not sure whether - - -

PN106

DEPUTY PRESIDENT KOVACIC: Mr Taylor, any objections?

*** DAVID MAURICE GUNZBURG

XN MR SHARIFF

PN107

MR TAYLOR: Yes, just a broad objection. This evidence, as the Commission will see, is nothing more than a series of broad opinions combined with what is purported to be a statistical analysis of some data. It is broadly objectionable on the basis that it is effectively an attempt by a lay witness to give some sort of expert evidence. It appears to be outside Mr Gunzburg's area of training and expertise. He is an industrial officer. There doesn't appear to be any basis to suggest he has somehow got some expertise in this area.

PN108

We say that, secondly, there is absence in many regards to the way in which he has gone about doing the task; an absence of explanation of reasoning and methodology. Further, there are in a number of respects reliance on data which, on even a cursory examination, is unreliable. As a broad objection we say this is really not evidence; shouldn't be admitted in toto.

PN109

We see that there are some similar objections being taken to at least some of the union evidence and we accept that this Commission takes a different approach than a court would take applying Rules of Evidence to allow effectively lay witnesses to put forward expert opinion. We have come prepared of course to cross-examine Mr Gunzburg as to all the deficiencies that we have identified, but as a broad proposition we say that this evidence is of so little weight that it wouldn't be admitted.

PN110

DEPUTY PRESIDENT KOVACIC: Mr Shariff?

PN111

MR SHARIFF: Through your Honours, could I ask my friend - I think if he is going to take an objection to the expression of opinions, he ought to identify where in the two statements Mr Gunzburg expresses an opinion. That is, anything other than a conclusion drawn from objective data. I think that's important. We haven't led Mr Gunzburg as an expert. We have led Mr Gunzburg's evidence to collate the relevantly available material and to draw together in a digestible format.

PN112

Just on this point - I think I raised this in my brief oral opening - there are two repositories of information about injury data; Coal Mines Insurance and the Queensland department. With Coal Mines Insurance, I don't know if your Honours recall, my side issued an order for production to them. Data was obtained from Coal Mines Insurance and that data, such as it was, has been annexed to Mr Gunzburg's evidence. The actual order for production is at DG5 and following - are the documents that were produced.

*** DAVID MAURICE GUNZBURG

XN MR SHARIFF

PN113

As I understand it, Coal Mines Insurance had other data available that they could have produced, but objection was taken to it by my friend's side. I can't now

articulate the precise basis of it, but Coal Mines Insurance didn't produce another set of data that could have been produced and I'm sure the records will bear that out. What Mr Gunzburg has done is to take that data and to translate it into a digestible form. We're not presenting it as an expert opinion.

PN114

If my friend says that there are some opinions that are expressed there of an expert nature, he should identify them, but we don't accept that the evidence is inadmissible. Even if it was not strictly in compliance with the expert rules, then your Honours would accept it because your Honours are not bound by the Rules of Evidence and it might go to questions of weight, especially if my friend says he is prepared to cross-examine on it.

PN115

DEPUTY PRESIDENT KOVACIC: Thank you. Mr Taylor, do you want to highlight any particular passages of Mr Gunzburg's witness statements?

PN116

MR TAYLOR: Yes, of course. Before I do, can I just deal with this off the cuff suggestion that somehow my client prevented CMI from producing material required to be produced by summons. That is quite wrong and it was quite wrong for it to be put. The true position, as I understand it, is simply this: Mr Gunzburg, at some point prior to issuing any summons, approached CMI on the basis that the unions agreed that certain material could be provided. The unions indicated that there was no such agreement and that then led to summonses being issued. To the extent to which the employers wanted information, they obtained it by summons. Nothing was done by my clients to impede that and it was quite wrong to suggest otherwise.

PN117

As for opinion, the material is replete with statements to the effect that what is set out in here is what it is. If you take the second statement, paragraph 4, it says:

PN118

Figure 1 represents the percentage of the length of the periods of accident pay in total over the period 1995 to 2016 in pie chart form.

PN119

He is asserting that that is the position. That is an opinion. It's based on data that he has been provided, but it's an opinion. When he says in his first statement at paragraph 25:

PN120

The data provided by CMI shows the total number of claims for workers compensation under insurance policies held with CMI -

*** DAVID MAURICE GUNZBURG

XN MR SHARIFF

PN121

et cetera, he is expressing an opinion. He is asserting that that is in fact the case; that you can proceed on the basis that what is set out in the statements is correct.

Now, they are opinions. When it comes to the second statement under "Complexity of determination of premium", he makes an opinion. Paragraph 11:

PN122

To the extent that either of these costs factors are reduced, then all other things being equal the level of premium that needs to be charged to cover the cost of insured accidents will reduce, as well.

PN123

That is an opinion. The entire material is nothing more than him putting forward to this Commission that certain charts and certain data records that he puts in the statement are statements that this Commission can rely upon as setting out the correct factual basis. I hope that assists.

PN124

DEPUTY PRESIDENT KOVACIC: Thank you for those submissions. The Bench is willing to admit both of the witness statements on the basis that it's open to the parties to make submissions as to the weight that might be attached to aspects of the evidence of Mr Gunzburg, so we will proceed on that basis. In those circumstances, I'll mark the first witness statement of Mr Gunzburg, which is dated 24 February 2016 and comprises 39 paragraphs and 11 annexures, exhibit 1.

**EXHIBIT #1 WITNESS STATEMENT OF DAVID GUNZBURG
DATED 24/02/2017 PLUS ANNEXURES**

PN125

DEPUTY PRESIDENT KOVACIC: I will mark the second statement of Mr Gunzburg, which is dated 18 August and comprises 17 paragraphs and three annexures, exhibit 2.

**EXHIBIT #2 WITNESS STATEMENT OF DAVID GUNZBURG
DATED 18/08/2017 PLUS ANNEXURES**

PN126

DEPUTY PRESIDENT KOVACIC: Mr Shariff?

PN127

MR SHARIFF: I have no further questions.

CROSS-EXAMINATION BY MR TAYLOR

[10.44 AM]

PN128

MR TAYLOR: Mr Gunzburg, do you have the two statements with you in the witness box?---I do.

PN129

Can I ask you to just turn to the first statement, exhibit 1, paragraph 6?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN130

You say there you have been engaged by the Coal Mining Industry Employer Group to provide advice and assistance. When you say "I", do you mean the company DGHR Services?---Yes.

PN131

Your role is that of an adviser to this group. Is that right?---An adviser and a convener of the group, I think is the best description.

PN132

The group itself is not a legal entity, is it?---No.

PN133

So when you are advising or convening the group, who are you advising or convening?---The various HR directors or HR managers who are employed by those organisations.

PN134

By "those organisations", is it the case that the firm Ashurst wrote to Collieries' Staff and Officials Association identifying 13 company groups who participate in and are described as the CMIEG, on 23 March of this year?---I believe so. I don't have that document in front of me.

PN135

Could I provide you with a copy of the letter that I refer to and at the same time provide copies to the Bench. You have before you now a letter of 23 March 2017, a two-page letter with a two-page annexure, addressed to Adam Guy of the Collieries' Staff and Officials Association?---Yes.

PN136

Does that list the company groups who you were advising or convening as at that date?---Yes.

PN137

Does the annexure provide the form of the variation that was being proposed by Ashurst and which sets out the change that is being sought in these proceedings?---Yes.

PN138

I tender that document.

PN139

DEPUTY PRESIDENT KOVACIC: Any objection?

PN140

MR SHARIFF: No objection.

PN141

DEPUTY PRESIDENT KOVACIC: I'll mark the letter as exhibit 3.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

**EXHIBIT #3 LETTER FROM ASHURST TO ADAM GUY OF
COLLIERIES' STAFF AND OFFICIALS ASSOCIATION DATED
23/03/2017**

PN142

MR TAYLOR: A decision was made to write to the President of this Commission in September 2016 to ask for this Commission to review this clause and, in particular, to review it in order to reduce accident pay from 78 weeks to 52 weeks. Is that right?---I believe so.

PN143

Who made that decision to write that letter?---That decision - or the instruction was made by myself to Ashurst after consultation with the members of the Coal Mining Industry Employers Group.

PN144

So you conveyed to Ashurst that that letter should be written?---Yes.

PN145

But you didn't make the decision as an adviser or convener. Am I right about that?---My memory is that I held discussions with the Coal Mining Industry Employers Group, proposed a course of action which they agreed with and I then issued the instruction to Ashurst on their behalf.

PN146

Does this take place in the form of some sort of meeting, the way a decision is made?---I can't recall the particular instance, but it is usually done either at a meeting or by way of telephone or email correspondence between myself and the CMIEG members.

PN147

When you are communicating with Ashurst, do we understand that you are communicating effectively as agent on behalf of these group of companies?---I'm not sure if that term has a particular meaning, but broadly that would describe my role.

PN148

The client of Ashurst is these group of companies, is it not?---I think technically I am the client - sorry, DGHR Services is Ashurst's client. I think that is the best way of describing it. My clients are the CMIEG members.

PN149

Do you understand that when this decision was made by the CMIEG, they did so based on advice that you provided them?---That would be one of the matters they would have considered. I am sure they had other sources of information though.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN150

In case there is any concern about this, I'm not about to ask you what the advice was, but is this the case: you did actually provide some advice to them prior to the decision being made?---Yes.

PN151

In order to provide that advice you, I presume, made yourself aware of the history of this clause in this award?---Only to some extent. I didn't research it fully at that time.

PN152

Can you recall what you had done at that time?---I was aware of the proceedings which had to do with the removal of the sunset provision and also the more general proceedings which led to the Full Bench decision which dealt more fully with the accident pay matter. I was broadly aware of the fact that there had been a long-standing provision in the award which had been inserted at the time of the making of the modern award. Beyond that, I don't think I had done any specific research on the history of the award going back before then.

PN153

When the application was made to remove the sunset provision in the accident pay, which was ultimately the subject of a decision of a Full Bench of this Commission - I think there were two decisions. The latter one was February 2015. Were you advising the CMIEG through that period?---Yes.

PN154

That advising role incorporated being involved in some way in advising in respect of those proceedings?---Yes.

PN155

DEPUTY PRESIDENT KOVACIC: Mr Taylor, can I just ask a question here. I'm just intrigued by the relevance of some of the questions.

PN156

MR TAYLOR: I'm about to take this witness to some of the matters. I'm just trying to make sure I understand the extent of his knowledge of them so that I don't end up going down paths that he is unaware of. It appears that he is familiar with these things. Also I'm going to ask him some specific questions about specific aspects of the claim. Again I just need to understand to what extent he understands who made that decision and what the decision is, so that he is in a position or not to answer those questions.

PN157

DEPUTY PRESIDENT KOVACIC: I just make the observation that it's not entirely clear how some of the questions relate to the matters that the Bench needs to determine in this particular case, but, given what you have just said, I'm willing to give you some latitude.

PN158

MR TAYLOR: Yes.

PN159

DEPUTY PRESIDENT KOVACIC: But I may pull you up again.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN160

MR TAYLOR: I mentioned to you a letter that was written to the President in September 2015. Could I provide you with a copy of a document. Do you have before you a letter of 22 September 2015 written by Ashurst to the President, Justice Ross?---Yes.

PN161

This was the first step, was it not, taken by CMIEG which led to where we are today?---There may have been some other communications prior to this. I think this is probably the first full statement of what we wanted to do.

PN162

I tender that letter.

PN163

MR SHARIFF: No objection.

PN164

DEPUTY PRESIDENT KOVACIC: I'll mark it exhibit 4.

**EXHIBIT #4 LETTER FROM ASHURST TO JUSTICE ROSS
DATED 22/09/2015**

PN165

MR TAYLOR: When you say that, "This is the first full statement of what we want to do," is that a reference to what appears under the heading "Summary of request", an opportunity to put submissions about a limitation of accident pay entitlements to a period of 52 weeks?---Yes.

PN166

Now, just to see if you understand, this is the matters of some of the histories involved: an accident pay provision was first place in an industrial instrument applying to coal miners in about 1973?---You're probably right. I don't recall the exact dates of these things. I would have to look at the written submissions we have made.

PN167

You recall that this clause was amended to a form that is not essentially different to the current clause by the Coal Industry Tribunal in February 1980?---I don't recall the dates, sorry.

PN168

You understand that the provision for about 37 years has been a 78-week provision?---I don't recall the dates that these were put in. I've seen them, but I just don't recall when they were. I would have to look at the documents to remind myself.

PN169

The current provision has 39 weeks referred to as the - just give me a moment. In short, it's 39 weeks at the rate an employee would be on if they were on paid personal leave?---If that's the relevant clause in the award, yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN170

Originally this was referred to as the paid sick leave rate of pay when it was first made?---I don't recall.

PN171

Let me take you maybe then further forward. When the modern award was made in December 2008, the terms of this award were largely agreed by the industry parties?---Yes.

PN172

This particular clause was in a form that was made - there were some minor amendments made at the time that that clause was made; the modern award clause?---I wasn't involved in those proceedings myself. I understand that the clause from the existing Production and Processing Employees Award was largely translated to the modern award without any attempt to review it; simply to put it in terminology appropriate for the modern award.

PN173

It was subject firstly to an amendment that removed a state based difference as to termination of employment. Are you familiar with that?---No.

PN174

Secondly, it was subject to a sunset provision. You are at least familiar with that?---Yes.

PN175

In 2013, the CFMEU made an application to remove the sunset provision. You were involved in that?---Yes.

PN176

You agree that that happened?---The application, yes.

PN177

You will recall, will you not, that CFMEU and APESMA put on a substantial case to convince the Commission to remove the sunset provision?---There was a case. I don't recall it involving any evidence or calling of witnesses. I'm not sure what "substantive" means in your terms there.

PN178

Have you read the statement of Mr Vickers in this case?---Yes.

PN179

Do you recall seeing a statement in very similar terms - - -?---Oh, yes.

PN180

When you say, "Oh, yes," you saw that Mr Vickers had filed an extensive statement for the purpose of those proceedings to remove the sunset provision?---That's correct. There was nobody called to give verbal evidence.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN181

No, he wasn't required for cross-examination?---That's correct.

PN182

But he put on substantial evidence as to the nature of this industry?---Yes.

PN183

The history of this clause?---Yes.

PN184

The unique nature of the industry requiring a different approach to safety?---Possibly. I don't recall the detail of that statement without reading it again.

PN185

The position of the companies that made up the CMIEG at that time, their submission in that case was limited to a support for an AiG submission?

PN186

MR SHARIFF: I object. I think we are, with respect, now travelling into areas that I'm not really sure what the relevance of these are. I have been waiting to see where my friend is going with this line of questions. If the purpose of this line of questions is to ascertain what was or was not before previous Full Benches of this Commission, that is a matter of record and both parties have addressed their submissions to that, and we have in our written submissions in reply identified with precision all the submissions that were made in the previous proceedings, including by my friend's clients.

PN187

I'm just not understanding the relevance or the purpose at the moment to the issues before this Commission of examining a particular witness, who may or may not have had limited involvement with earlier proceedings, as to what his knowledge or understanding is of matters that are really objectively on the record.

PN188

DEPUTY PRESIDENT KOVACIC: Mr Taylor?

PN189

MR TAYLOR: Well, I thought we had established that this witness was involved in providing advice at that time in those proceedings. Very much part of establishing the relevant matters in this case is to understand what was the employer position at various points in time. This witness seems to be the only person who would know - would be in a position to tell the Commission what the position was of this group of people that he was advising and, hence, it's quite appropriate for me to find out and to inform the Bench as to the position that the employer parties have taken up until September 2015.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN190

DEPUTY PRESIDENT KOVACIC: I will just make one observation. I think in the CMIEG's reply submissions the thread that is made there is that the initial Full Bench proceedings around accident pay in respect to this award solely related to

removal of the sunset or transitional provision, however you want to describe it. I'm not quite sure where the line of questioning actually takes us in this regard in circumstances where, albeit a different Full Bench to this one, determined that the CMIEG's application in respect of accident pay was a matter that could be heard and determined by the Commission.

PN191

From an historical perspective, the question of relevance - and I raised it before - is one that still persists in my mind over the utility of the line of questioning, frankly.

PN192

MR TAYLOR: I hear what you say and I will, on that basis, move on to the next subject.

PN193

Mr Gunzburg, can I just ask you some questions about this industry. You have been involved, have you, in advising or industrial relations in this industry for some years?---Yes.

PN194

How long have you been involved in providing industrial advice in respect to this industry?---I'm trying to think of the date. From around 2011, I think. I have had some involvement with the industry previously when I was an employee of BHP, but not directly. My more direct involvement commenced in around 2011.

PN195

During that time you have become familiar, have you not, with the fact that the coal mining industry is treated as separate for the purposes of safety and health legislation by state governments?---Yes, to a greater and lesser extent in different states.

PN196

So in Queensland there is the Coal Mining Safety and Health Act 2001 that is the relevant piece of legislation dealing with safety and health in that state?---I don't know the name of the relevant Act. If you say so.

PN197

You're familiar though that there is one Act that deals with just safety and health for coal mining and there is another Act that deals with safety and health for other employers?---I wasn't - there are a number of Acts which apply to coal mines. I'm sure there is one which applies to coal mines and only coal mines. There may be more general Acts which apply to the operations of coal mines, as well.

PN198

In New South Wales there is legislation that is separate work health and safety legislation which, since 2013, has applied to mines including coal mines and petroleum sites?---I'm sorry, I'm not sure which piece of legislation you're referring to there.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN199

I didn't give you the name, only because you seem to hesitate last time on the name, but I'll give it to you: the Work Health and Safety (Mines and Petroleum Sites) Act 2013?---Yes. I was wondering if you were talking about the Insurance Act.

PN200

Prior to 2013, in New South Wales there was work health and safety legislation that applied only to coal mines?---I'm not sure.

PN201

The current 2013 Act has a separate part that only applies to coal mines?---I'm not sure.

PN202

You agree with me that underground coal mining has unique safety issues that one doesn't find at other workplaces?---Like all industries, yes.

PN203

The very fact that you're working in confined spaces underground has issues involved that are associated with that, including roof collapse?---There are underground mines which are not coal mines which would probably have the same sorts of issues, to some extent at least.

PN204

But the nature of a coal mine is that roof collapses are inevitable and necessary?---If you're talking about a longwall mining operation - - -

PN205

Yes?---Yes, that's the way in which a longwall mining machine, operation, takes place.

PN206

There are specific safety issues associated with collapsing - - -?---Yes.

PN207

- - - roofs down with the potential obviously of very serious safety issues that arise for anyone in the vicinity of such a fall?---There are certainly risks involved, yes.

PN208

Methane gas is a safety issue which is always present in an underground mine, is it not?---I don't profess to be an expert in underground mine safety, so I don't know. I presume so.

PN209

The recent recurrence of black lung disease, is that something that has come to your attention?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN210

That is something which is associated with a coal mining, is it not?---Yes.

PN211

There are some specific and unique safety issues that arise from that debilitating condition?---Yes.

PN212

Coal mining legislation requires employers to employ people with specific qualifications to address safety when working in a coal mine?---Yes.

PN213

To obtain such positions a person would need to have specific training and experience in coal mining work?---Yes.

PN214

That includes formal qualifications for those who hold the position of undermanager or deputy?---I'm not sure about that. I simply don't know.

PN215

You told us earlier about a decision - sorry, I withdraw that and let me just show you something first, then I'll come to this. Do you mind getting out the exhibit 3, which is the letter of 23 March, and it has an annexure which provides the proposed variation to clause 18. If you turn to the annexure page, which is numbered page 3 at the top?---Yes.

PN216

Do you see there the proposed changes are, in 18.1(b), to change 78 to 52 and then, in 18.2(a), to change 39 to 26 and (b) to change 39 to 26?---(no audible reply)

PN217

Can I just focus on the latter changes in 18.2. They were not foreshadowed in express terms in exhibit 4, the letter to the President in September 2015?---No.

PN218

Are you aware of the reasons why the consequence of reducing the 52 weeks is to reduce each of those matters to 26? Were you part of that decision?---Yes. As I recall, it flowed simply as a matter of either commonsense or precedence from the Full Bench decision which set the limit of 52 weeks.

PN219

Well, there are two reasons there. Do you recall whether it was both of those or only one of them?---No, I don't. I think it was a mixture of the two.

PN220

You accept, of course, that you can get to 52 weeks by not adjusting 18.2(a) and only adjusting 18.2(b)?---I'm sorry, I'm not sure I understand the question.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN221

You can reduce the overall sum from 78 to 52 weeks without touching 18.2(a). 18.2(b) could simply be reduced from 39 to 13 weeks and you would have still a 52-week reduction?---Yes.

PN222

You understand from the material that has been filed that the bulk of the reduction in the amount that injured workers would receive if this change was made is caused by the change in 18.2(a), do you not?---I think that's correct, yes.

PN223

Is that something that at the time you made the decision, or a decision was made, you were aware of?---At the time that the letter was written we hadn't collected the information which I think you have just referred to and which is in my statement, but I would have been aware generally that the majority of periods away from work is less than 26 weeks.

PN224

Yes, but do you recall my question? At the time that a decision was made to reduce 18.2(a) from 39 to 26 weeks rather than leaving it at 39 weeks, were you aware that that change would be the change that would cause the bulk of the reduction in top-up pay for injured workers?---I would have been aware of it if I had turned my mind to it. I don't recall doing so at the time.

PN225

We understand, do we, from your earlier evidence, that the decision was made - was this decision made to make these changes based on advice that you gave?---Yes.

PN226

So does it follow from what you have said that your advice did not extend to explaining the impact of this change from 39 to 26 weeks on injured workers?

PN227

MR SHARIFF: I object. I think we might be straying into the content of the advice, which is objectionable. The fact of advice, the fact of people taking advice and making a decision flowing from it is one thing, but if we're getting into the content of advice, that raises issues, because I don't wish this witness to inadvertently waive privilege over how he came to give that advice. That's what I'm concerned about. Notwithstanding the fact that this witness is not a lawyer, that doesn't mean he is capable of waiving privilege on any advice that might have been given to him. That's what I'm concerned about.

PN228

DEPUTY PRESIDENT KOVACIC: Mr Taylor, you might be very mindful of how you frame the question.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN229

MR TAYLOR: Yes, well, I think maybe we can just leave it on this basis: firstly, the decision was not made by you. Is that understood or have I got that wrong?

This decision to reduce 18.2(a) in the way that they are, you didn't make that decision?---The instruction to Ashurst to write that letter was from me.

PN230

Yes?---The decision was made by the Coal Mining Industry Employers Group who I was advising at the time.

PN231

Yes. To the best of your knowledge, they made that decision based on the advice that you gave them?---Yes. I'm not sure if they had any other advice though.

PN232

This decision was made, was it, in your presence?---No.

PN233

It was not?---No. This was done, I'm almost sure, by way of email and telephone correspondence.

PN234

To the best of your knowledge, were you copied in on that email and telephone correspondence?---This was correspondence between myself and the CMIEG members, I believe.

PN235

I see. To the best of your knowledge, the only information that the decision-makers had was information that they had obtained from you by way of email and telephone?---I know what I said to them. I don't know what their other discussions or internal thought processes might have been.

PN236

Just remind us, we are talking about 13 HR managers, are we?---Some of the companies have more than one person I correspond to, so there are more than 13 people.

PN237

HR managers from 13 companies?---Yes. That sort of title, yes.

PN238

Can I just show you - I think you have seen them, but just for convenience - copies of the submissions filed by both the union and the employer group in reply which deal with this issue of the loss that would be effected by the change that is being proposed. First, if you wouldn't mind looking at the union submissions document?---Yes.

PN239

Does the Bench have the submissions document?

PN240

DEPUTY PRESIDENT KOVACIC: Mr Gunzburg, can I ask you to step out of the courtroom for a moment. I just have a question around this.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

<THE WITNESS WITHDREW

[11.22 AM]

PN241

DEPUTY PRESIDENT KOVACIC: Mr Taylor, the question I have is how does this question go to Mr Gunzburg's evidence?

PN242

MR TAYLOR: Well, it goes to our case. We are not of course limited to only asking questions about the evidence that he has given. He is here to give evidence as to matters which are relevant to matters in the proceeding and a key issue between us - which I will come to when it comes to actually his evidence - is that there is a key factual issue as to the impact of the claim; which then means that when you look at his evidence, a lot of his evidence as to impact on claims and so forth is of limited relevance and yet there is some other evidence which he could have provided to the Commission which is of relevance as to the impact of this claim on those who are injured for more than 26 weeks.

PN243

The starting point is to make sure that we are quite clear about where the impact of this change is and then to move into those parts of his evidence where he attempts to suggest what is statistically relevant for this Commission to know about injury claims and length of them, and the like.

PN244

DEPUTY PRESIDENT KOVACIC: I am willing to grant you some rope, but I have to say that it is a bit tenuous from my perspective - and I'm speaking solely from my perspective. Nonetheless, I'm willing to grant you the scope to put those questions, but there is a prospect that Mr Gunzburg may come back and say he is not in a position to comment in any authoritative way on either of the contentions as to those cost implications. Where does that take the Bench, frankly?

PN245

MR TAYLOR: Of course.

PN246

DEPUTY PRESIDENT KOVACIC: We will get Mr Gunzburg back in.

PN247

COMMISSIONER BISSETT: Mr Taylor, just while Mr Gunzburg is coming back, what is the date of the submission?

<DAVID MAURICE GUNZBURG, RECALLED

[11.24 AM]

CROSS-EXAMINATION BY MR TAYLOR, CONTINUING

[11.24 AM]

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN248

MR TAYLOR: Mr Gunzburg, if you could assist, Mr Fagir tells me that we handed you a bundle of material which includes multiple copies of the two submissions I wanted to show you. It might just be convenient if you could retain

one copy of each of them and then provide to the associate the other copies so that the Bench can have them in front of them as I ask you questions.

PN249

THE ASSOCIATE: There is just one copy.

PN250

MR TAYLOR: If Mr Gunzburg could have one copy of each.

PN251

THE ASSOCIATE: He does. There is just the one single copy here.

PN252

DEPUTY PRESIDENT KOVACIC: I'm assuming it's the unions' submissions which are under the covering email dated 4 July.

PN253

MR TAYLOR: Yes. We only have one set of submissions. I think that would be the - - -

PN254

DEPUTY PRESIDENT KOVACIC: It's the CMIEG's reply submissions.

PN255

MR TAYLOR: It is.

PN256

DEPUTY PRESIDENT KOVACIC: Which were, from memory, dated 18 August. Is that correct?

PN257

MR TAYLOR: Yes. I think there was one additional copy, if any member of the Bench doesn't have them, that Mr Fagir has provided to the associate.

PN258

Just looking at this, Mr Gunzburg, the unions' submissions at page 10, you'll see there a chart or a table which has been produced which is based on certain assumptions as to how much money is the usual remuneration for an undermanager. Based on those assumptions, it shows a loss of remuneration over a 78-week period. You saw that when it came in, did you not?---Yes.

PN259

Was that the first time you identified the importance of the change to 18.2(a) - rather than simply changing 18.2(b), the importance of the change as to the bulk of - the effect of the change would be a substantial loss of income for an injured worker between 26 weeks and 39 weeks?

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN260

MR SHARIFF: I object. Apart from all the loaded words about substantial loss and the like, there is a premise in the calculation of the table which we point out in

our submissions in reply, which you pick up from footnote 18, which is that these rates have been pegged to the rates payable to an undermanager, which is the highest - I withdraw that. We say it's at the upper end of the rates and also the particular rate that has been derived as the comparative rate is something that is drawn from evidence that we have some things to say about.

PN261

I won't raise them now, but my friend's question isn't actually a fair one because what he is inviting this witness to draw a conclusion about is the impact of the amendment in 18.2(a) to all employees and that's just not a fair representation.

PN262

DEPUTY PRESIDENT KOVACIC: Mr Taylor?

PN263

MR TAYLOR: Yes. I press the question, which I think is not the question my friend has suggested I put. I'm happy to rephrase it as simply this: upon receiving this submission, was this the first time that you identified that the change to 18.2(a) would lead to a loss of remuneration for someone who was injured between 26 weeks and 39 weeks?

PN264

MR SHARIFF: I object.

PN265

MR TAYLOR: On what basis?

PN266

MR SHARIFF: It's the same thing; for someone. It's the "someone". It's not for someone. This particular table is in respect of an undermanager and derived from an assumption about what the undermanager would be paid. It, in my respectful submission, remains an unfair question. If my friend wants to put, because representation - "Is this the first time you learned about what the possible impact might have been for an undermanager?" assuming the premise is contained in the table, that's a fair question.

PN267

MR TAYLOR: I don't accept that, but what I'm going to do is withdraw the question and ask Mr Gunzburg to look at the CMIEG reply submission.

PN268

Do you have that with you?---Yes, I do.

PN269

This isn't the first time of course you've seen the submission?---That's correct.

PN270

You saw that there are some similar tables to the table I showed you, on pages 15 and 16 of the document?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN271

The first table "New South Wales mine worker", taking an annualised salary of a five-day, Monday to Friday, eight-hour day roster - firstly, are you familiar with the usual rosters of mine workers in New South Wales?---I wouldn't be able to tell you what a usual roster is. I know there is a huge variety of them.

PN272

Are you familiar enough to accept this proposition: there are not New South Wales mine workers who are engaged on an annualised salary of a five-day, Monday to Friday, eight-hour day roster?---I don't know. I don't know the employment conditions of every mine worker in New South Wales.

PN273

Do you accept this proposition: to the extent to which you do know them, none of the rosters that you're aware of are a five-day, Monday to Friday, eight-hour day roster?---I'm not aware of that roster. I'm not aware of a number of rosters that must exist.

PN274

You don't know that this roster actually exists, do you?---No.

PN275

MR SHARIFF: Can I just object to that? It's a footnote that indicates that the roster is derived from an enterprise agreement; the Mt Arthur Enterprise Agreement. If the roster exists in an enterprise agreement, it's a fair assumption to make, but whether this witness knows the fact or not, that's a different issue. Ultimately I would press the objection on the grounds of relevance. What does it matter whether this witness knows or not? The table has been created on the premise of an enterprise agreement and the rosters contained in an enterprise agreement.

PN276

DEPUTY PRESIDENT KOVACIC: Mr Taylor?

PN277

MR TAYLOR: Are you familiar with that enterprise agreement?---In a passing sense only.

PN278

Are you sufficiently familiar to understand that something in the order of 90 per cent of the workers under that agreement are not engaged on a five-day, Monday to Friday, eight-hour day?---No, I don't know.

PN279

The next page is your client's submission of the effect of the claim, if granted, on a New South Wales mine worker on an annualised salary of seven days, 12 hours, based on certain assumptions of what their remuneration is?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN280

You see there that the bulk of the impact of the change that has been proposed under the heading "Difference between current award and proposed clause" is an impact that affects those whose - the top-up income between 27 weeks and 39 weeks?---Yes.

PN281

You accept, do you not, that in respect of New South Wales workers that is true regardless of whether they're an undermanager, a mine worker? Every permutation, the bulk of the difference is going to be at that point between 27 to 39 weeks?---Yes, I think that's correct.

PN282

Is that thing that you just acknowledged something you first became aware of when you saw the unions' submissions that I showed you earlier, the 5 July submissions, which contained that particular example of an undermanager?---I can't recall. That was the first time I saw a table setting out the calculation in that way, but I would have thought - if I put my mind to it, I would have understood the difference before that. I just can't recall ever turning my mind to that particular issue.

PN283

I see. You accept, do you, that if CMIEG proposed amending 18.2(a) to replace 39 with 52 weeks and deleted (b), that that would also be a clause that would be a 52-week accident pay clause?

PN284

DEPUTY PRESIDENT KOVACIC: What is the relevance of that? I mean, the fact of the matter is that the claim doesn't seek to do that.

PN285

MR TAYLOR: Yes, I appreciate that. This Commission of course - - -

PN286

MR SHARIFF: Unless my friend wants to put an alternate variation.

PN287

MR TAYLOR: This Commission ultimately, as always in these situations, is not bound by the particular proposal that is put forward by any party. This particular party has chosen - for reasons that, frankly, are unclear - an alteration which has a particular consequence. The Commission might ultimately determine that that change shouldn't be made at all, as we submit, or that if a change should be made, it shouldn't be made in a way that has the significant effect that this employer is, whether intentionally or otherwise, going to bring about. Hence, we think it's useful for the Commission to understand what this employee's evidence would be about such a matter.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN288

MR SHARIFF: Might I just be heard very briefly on that? On the 26-week issue, your Honours will recall in the 2015 decision the finding actually was the entitlement would be 26 weeks and the vast bulk of the award was accepted as

seven. For seven - I think it was roughly seven - it was said to be 52 weeks. That also contradicts something my friend said I think in opening, where he said the entitlement in other awards was 52 at the full personal rate. I didn't wish to correct it then, but I do that now.

PN289

The logic of 26 and 52, why it's compartmentalised, what this witness - as your Honour has rightly pointed out to my friend - says about it is irrelevant. We can take you to the logic of that in submissions, but if what I'm hearing from the line of logic of my friend's question is that might be inviting the Commission to say you shouldn't accept the CMIEG variation but there might be something else you could accept, that should just be made clear so we can all understand. I can then conduct my case on that basis, as well.

PN290

DEPUTY PRESIDENT KOVACIC: Mr Taylor?

PN291

MR TAYLOR: Mr Gunzburg, can I now take you to this: in New South Wales, accident pay when it is paid to an injured worker is paid by the insurer, CMI?---Yes.

PN292

This is the compulsory insurer for all employers in New South Wales?---Yes.

PN293

CMI levies on employers in New South Wales a premium every year?---Yes.

PN294

That premium is a single premium which covers the employers for both workers compensation and any accident pay top-up that might need to be paid?---Yes.

PN295

Now, you said something about the calculation - - -?---I'm sorry, it may be CSPL rather than CMI which actually makes the levy.

PN296

Just explain to us who CSPL is?---CSPL is Coal Services Pty Ltd, which is an associated company of CMI Ltd. There are, I think, three or four companies which have the same board and work together. CSPL could be described as, to some extent, the holding company under which CMI operates. That's probably not a correct legal term, but gives the right understanding.

PN297

So whether it's CMI or CSPL, the relevant entity levies on employers a single premium each year that raises sufficient income from which they pay workers compensation and accident pay top-up?---It's a little more complicated than that, but broadly, yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN298

You have said something about the calculation of premiums in your second statement?---Yes.

PN299

You held a position on the board of Coal Services?---Yes.

PN300

You say it was as a result of having that position as a director that you understood the insurance functions of CMI?---That's how I came to understand them, yes.

PN301

Now, the precise methodology by which the premium calculations are made, is that a matter that is commercial-in-confidence and not publicly available?---In broad terms, I don't think so, as it's explained generally by CSPL and CMI to their policy holders and also there is a degree of information publicly available on their web site.

PN302

From your role, did you come to understand that the primary cost on the scheme from which payments must be made are injuries where someone is injured for less than 26 - who is off work for less than 26 weeks?---I was aware that the majority of accidents involved less than 26 weeks away from work, so that then flows that the majority of the cost is in that area.

PN303

Indeed, some of the cost is people who don't actually have time off at all but need health services of some sort from which they make a workers compensation claim?---Yes.

PN304

What can affect premiums can include simply the number of claims that are made in any particular year?---Well, as long as there is a cost associated with that claim, yes.

PN305

The amount that is raised by way of a premium, do I take it that's determined by some actuarial assessment based on funds held and expectations of monetary needs going forward?---Not quite. The process is that for each injury year - so for each year that the calculation is done - there is an approximation made of the likely expense into the future from accidents arising - that take place in that year, so trying to project out how long they might last for. Then a premium is charged at a level which, when received and invested, including the hopeful earnings on the investment, will equal the cost of that year's accidents. You can never be exactly correct, but that's how the calculation is done.

PN306

Yes. There are a variety of factors that go into determining the premium beyond just the expectation of the level of claims made on accident pay. Do you accept that?---Yes, but that is by far the main one.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN307

DEPUTY PRESIDENT KOVACIC: Mr Gunzburg, do the premiums differ across coal producers in the sense that some may have a better safety performance than others?---Yes. There is a base premium calculated and then the companies have - that is adjusted up or down for individual companies based on their performance. That's one of the factors which is included in the calculation of what the base premium has to be.

PN308

Thank you. Mr Taylor.

PN309

MR TAYLOR: You indicate at paragraph 13 of your second statement that it is very difficult to determine the exact impact on premium as a result of changes to the award clause. Is one of the factors that can affect the premium in any given year simply the movement in the value of the investments held in the preceding year?---No, that's more likely to have an impact on future premiums.

PN310

So when the premium is being set?---Yes.

PN311

Then presumably the analysis of how capital markets have moved and affected the investments in the previous 12 months will be part of the factor that would come into play?---Well, it's more an estimation of what the expected earnings of that set of money will be. People who do this will have their own views as to how much that should be based on the previous 12 months' experience.

PN312

The data that you summarise - which I'm going to come to in a moment?---Yes.

PN313

Suggests that it's a very small number of the overall claims - to put it another way, a very small percentage of the overall claims - which involve people who are making a claim beyond 26 weeks?---Yes.

PN314

So if one moves from the proposition that the impact of this change has no - firstly, do you accept that the impact of the alteration that is being sought by the employer group makes no difference for the first 26 weeks?---I believe that's the case.

PN315

The potential for it to impact on premiums could only be in respect of the small percentage of claims that are made by people who are off work for more than 26 weeks?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN316

There would be, can I suggest to you, factors such as increased cost of health services or changes in capital markets that are likely to have a greater impact on

premiums than any change that might come out of this case?---I can't predict what they will be, but, whatever they do, the amount of accident pay which is paid out of the scheme will impact on the premiums which have to be charged no matter what happens to those other matters.

PN317

You haven't led any evidence to suggest that impact is of any consequence. Do you accept that?---I don't - I haven't - I'm not sure I understand the question.

PN318

MR SHARIFF: Your Honours, it's really a submission, isn't it? Whether evidence has been led or not is a question ultimately of submission at the end of the day.

PN319

DEPUTY PRESIDENT KOVACIC: I think that's right, but I think the question is a legitimate question, Mr Taylor, so I'll let it stand. You might repeat it for the benefit of Mr Gunzburg.

PN320

MR TAYLOR: Mr Gunzburg, given what you know about the factors that affect premiums and given what you've accepted about the very small percentage of overall claims that involve people being injured for more than 26 weeks, do you accept that the impact on premiums is something which would be of little or no consequence?---No, I don't. The reason I say that is I'm aware that in attempting to manage costs and keep premiums down, the main area of concentration is on what people typically call the long tail injuries. In other words, the ones which actually extend far into the future. It's certainly of consequence to what premiums will need to be charged into the future.

PN321

Let me put it another way: you have got no basis and you do not suggest to this Commission, do you, that this change would in fact lead to any decrease in premiums?---I think I said it does. It will.

PN322

Well, I think what you have said is it's very difficult to determine the exact impact on premium, but can I put this to you squarely: given the various matters that can impact on premiums, you've got no basis to think that making this change - which will affect that very small percentage of overall claims - will in fact lower premiums. Do you accept that?---No.

PN323

Let me take you to the question of some of the statistical data you have put before the Commission. I think you accept that you are not someone who has any formal qualifications in statistics?---I think as I said in a previous matter, I did one semester of statistics in my university degree.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN324

Yes. Can you understand perhaps now sitting here in light of previous events, of the importance of ensuring that the data you summarise is done so accurately?---I would have been aware of that beforehand.

PN325

MR SHARIFF: I object. The premise in that question is a very unfair one, because it suggests the witness has on some previous occasion not done so. It's just really unfair.

PN326

MR TAYLOR: I withdraw the question.

PN327

You are aware of the importance of ensuring the data that you summarise is done accurately?---That my summary is accurate, yes.

PN328

What you have done is you have downloaded some data and put them into graphs using Excel. Is that right?---Yes.

PN329

Do you say that you took steps to ensure that the information provided was not in any way misleading?

PN330

MR SHARIFF: I object. Those questions are fairly general, because some of the data - for example, the data at paragraph 16 in figure 2 - is simply an extract. It's just a replication. There hasn't been any manipulation of anything. It's just very unfair. There are tables at paragraphs 27, 31 and 35 that reflect an adaptation of the data that has been adduced from CMI. My friend should direct the witness, if he's going to critique, to the data that this witness has himself produced by the specific tables or specific data set as opposed to the other data where he is simply extracting it from available sources.

PN331

DEPUTY PRESIDENT KOVACIC: Mr Taylor, you might reflect on how your question is framed.

PN332

MR TAYLOR: Yes, of course.

PN333

Can I take you to your first statement at paragraph 15. Do you have that in front of you?---Yes.

PN334

In this paragraph you are drawing on an annual report - Coal Services' annual report - are you not?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN335

This is data for New South Wales only?---Yes.

PN336

The one thing you have extracted from that annual report is a chart which shows a mechanism of injury. Do you see that?---Yes.

PN337

We don't learn from that chart anything, do we, about the extent to which people are injured for more than 26 weeks?---No.

PN338

There is material in that annual report though that does say something about that, is there not?---Yes.

PN339

Can I ask you to turn to page 64, as numbered by your numbering - when I say "your", the numbers that are not the numbers at the top right-hand corner, but in the bottom right-hand corner. Firstly, go to page 66. I'm sorry to do this to you. Can you go to page 66. Is the chart that you decided to extract in your statement found at the bottom right-hand corner of 66?---Yes.

PN340

If one turns the page to 64, do you see there the heading "Claims management"?---Yes.

PN341

Do you see there that there is a statement made by this annual report that the complexity or seriousness of claims has increased?---Yes.

PN342

If you go to the next paragraph, there is a deterioration in the number of claims that have been finalised within the first 26 weeks?---Yes.

PN343

What one sees in the table at the bottom is that represented in a both numerical and percentage means to show the percentage of claims that are being resolved within 26 weeks - sorry, I should withdraw that. The percentage of significant injury claims which are resolved within 26 weeks?---I'm sorry, I can't find a percentage number anywhere.

PN344

I see. If you look at that chart on the left-hand side, page 64, there are some years starting 2011-12?---Yes.

PN345

There are a number of columns - - -?---I'm sorry, at the bottom, yes.

PN346

The bottom?---Yes, yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN347

Do you accept that what this annual report that you annexed is recording is, firstly, that there is an increased number of serious injury claims that are taking longer than 26 weeks to resolve?---I think that's what it says. "Current open claims at the start of each year" - I think that's correct, yes.

PN348

You would accept that if this trend continues, then the impact of the employer claim in this case will increase over time?

PN349

MR SHARIFF: I object. There are two disconnected propositions in that. One is this report is talking about the resolution of claims within 26 weeks. It is an entirely distinct thing to whether the length of time away from work is 26 weeks or - - -

PN350

MR FAGIR He has just given evidence - - -

PN351

MR SHARIFF: I'm happy to address this in the absence of the witness, because - - -

PN352

DEPUTY PRESIDENT KOVACIC: Yes.

PN353

MR SHARIFF: - - - there is a degree of excitement to my right and behind me.

PN354

DEPUTY PRESIDENT KOVACIC: Mr Gunzburg, you might step out of the courtroom. Thank you.

<THE WITNESS WITHDREW

[11.56 AM]

PN355

MR TAYLOR: You have just given him all the answers.

PN356

MR SHARIFF: If you want to make that allegation, stand up and make it. If there is going to be an allegation made that I'm influencing a witness's evidence, make it.

PN357

DEPUTY PRESIDENT KOVACIC: Mr Fagir, Mr Taylor, do you have anything to say?

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN358

MR TAYLOR: I think there have been a couple of occasions where Mr Shariff has taken a view that the nature of the questions were in some way misleading.

Instead perhaps of simply taking the course of making that submission and then perhaps without needing to inconvenience the witness or the Commission in asking the witness to leave, informing me of the issue so that I can immediately address anything that is in fact misleading, he has taken an approach - which I accept is open to him - of then making clear the position, which then has the potential to obviously affect the way the cross-examination goes forward.

PN359

I don't wish to take it any further at this point. I hear what my friend has said, albeit in the presence of the witness, and I'm content for the witness to return and for me to identify that issue that Mr Shariff has just identified, and then see where that takes us.

PN360

DEPUTY PRESIDENT KOVACIC: Mr Shariff?

PN361

MR SHARIFF: I don't accept any of that. In taking an objection, the general schooling I've had is you take an objection and you identify the basis for the objection. If there has been some complaint, rather than do it sotto voce, raise it. I object to that altogether. I'm not going to provide a running commentary to sotto voce comments coming from the right.

PN362

The proposition I am raising is that there have been propositions put to this witness about what appears in the text of page 64, in the left-hand column. They are propositions relating to the finalisation of claims and the resolution of them, and so much appears from the idea that there were current open claims at the start of the year. The proposition that my friend then puts to the witness is wouldn't that mean, as a result of the employer claims being accepted, an exacerbation of the problem.

PN363

As I said, the basis of my objection is it is just disconnected. There is a distinction between the resolution of a workers compensation claim within a period of 26 weeks, or however long that takes, because that's the right of the insurer, as opposed to whether the injury is one which results in the worker being absent from work for 26 weeks or greater. That's my point. I reject the suggestion that I was trying to influence the witness. My friends know better than that.

PN364

DEPUTY PRESIDENT KOVACIC: The question I have is one that is alluded to by Mr Shariff - and this is probably a question for Mr Taylor - as to what extent finalisation of claims within 26 weeks equates to an absence from work for that period.

PN365

MR TAYLOR: Yes, I think that is a legitimate question. That is what I was alluding to. When Mr Gunzburg comes back, I'm going to - now that that issue

has been raised by Mr Shariff, I thought it was appropriate that that be raised with the witness. I agree. That's what I intended to do.

PN366

DEPUTY PRESIDENT KOVACIC: I think that is a legitimate question to ask.

PN367

MR TAYLOR: Yes.

PN368

DEPUTY PRESIDENT KOVACIC: That might clarify some of the questions.

PN369

MR SHARIFF: Yes, that can be done before the - - -

PN370

DEPUTY PRESIDENT KOVACIC: Can I just make the observation that to the extent, Mr Shariff, at any stage you have objections - please don't take this as a criticism, because it's not intended as a criticism, but where it may - - -

PN371

MR SHARIFF: I've heard what my friends say.

PN372

DEPUTY PRESIDENT KOVACIC: Yes.

PN373

MR SHARIFF: I'll ask him to leave.

PN374

DEPUTY PRESIDENT KOVACIC: Yes. And I'm mindful of it as well in terms of very mindful of not trying to influence the witness by the exchange, if I can characterise it that way, that might occur from the Bar table around objections.

PN375

MR SHARIFF: Yes. Yes.

PN376

DEPUTY PRESIDENT KOVACIC: But I would just ask that people be mindful of that. And equally I would make the observation to the extent that there are commentary from the sidelines I don't think that's helpful.

PN377

MR SHARIFF: No, I accept that.

<DAVID MAURICE GUNZBURG, RECALLED [12.01 PM]

CROSS-EXAMINATION BY MR TAYLOR, CONTINUING [12.01 PM]

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN378

DEPUTY PRESIDENT KOVACIC: I think you've got your 10,000 steps up today, Mr Gunzburg?---The suspense is killing me.

PN379

MR TAYLOR: Mr Gunzburg, I was asking you some questions on page 64 ---?---Yes.

PN380

As numbered as annexed to your statement, and drawing your attention to that part of the annual report which showed a decreasing rate of finalisation of claims within 26 weeks. Are you familiar enough with claims management to know whether that would include claims of people who are not, in fact, off work for the entire 26 weeks, but are maybe, in some way, have had a serious injury but have been able to return to work in some manner?---No, I'm not. I'm certainly not aware of what the basis of this particular table was prepared. I do note though, having had a chance to look at it, that in fact the figure is falling at 2015/16, so I'm not sure that you could say that there is a rise, which is ongoing.

PN381

Yes. You're pointing to the second to last column, which is simply recording a number of current open claims at the start of the year?---Yes.

PN382

The percentage of claims finalised within 26 weeks appears to be continuing to fall in 2015/16?---Well, it goes up and down from – over that period from 81 per cent to 84 to 81 to 80 to 77.

PN383

Yes. Do you accept this proposition, and it may be you don't have enough knowledge to know whether this is true, if what this is recording is both people who are off work for at least 26 weeks as well as people who have a claim that hasn't yet been finalised within 26 weeks, it is nevertheless suggesting that overall complexity of claims is increasing. Do you accept that?---Well, I accept the statement that Coal Services makes in their annual report that the complexity or seriousness of claims also increased.

PN384

Yes?---That's what they say.

PN385

Do you have any knowledge, one way or the other to know whether in fact it's the case that claims of people who are off work for more than 26 weeks in New South Wales is not decreasing; it hasn't decreased over the last decade?---I'm sorry, yes, I've collected data from CMI about the actual absence – length of absence from work.

PN386

Yes?---Over a period of time which shows a steady decrease. I'd need to have a look at – I'm not sure if that's the same question that you just asked me though.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN387

I was asking you specifically about claims of people who have been off work for more than 26 weeks; that that number is not something that, from your knowledge, has been decreasing? If you don't know off the top of your head I'll take you - - -?---I think I'm being confused by the claims part of it as opposed to the actual absence. The actual absence is the piece of data I have got, and I'd need to look at to - - -

PN388

Let me show you that in a moment?---Yes.

PN389

This particular – no, I'll withdraw that. I don't need to take you to that document as well?---Mm-hm.

PN390

In paragraph 17 of your first statement you refer to a different document?---Yes.

PN391

In this case it's now Queensland data. Am I right about that?---Yes.

PN392

You annex the document which you refer to in paragraph 17; the Queensland Mines and Quarry Safety Performance Report for 2015/2016 as DG3. Could I just ask you to turn to what is numbered page 139 of that document? There's a series of charts that start earlier on page 133 called Lag Performance Indicators Incident Rates. So I'm asking you about that. Can I just ask you to turn to page 139, top figure, figure 4.12, Permanent Incapacity Frequency Rate? Here there's a chart dealing with a number of permanent incapacities per million hours worked in each of the mine industries so that coal surface and coal underground are both separately indicated by lines. In their case they appear to be navy lines?---Mm.

PN393

Do you agree with me that those who are permanently incapacitated are people who are going to be likely to in effect claim the full 78 weeks of top up pay before it expires?---I believe so. There would be a definition of what permanent incapacity is in here somewhere.

PN394

Yes. This suggested in Queensland those who are permanently incapacitated it's not decreasing over that five year period of the Lag Performance Indicator. It appears that for the two coal mine areas, surface/underground, it's increasing – there seems to be a rather substantial increase in one particular year, but as a general trend it's not decreasing, is it?---It doesn't appear to be. I think permanent incapacity is a fairly infrequent event.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN395

Yes?---So that data would be very much up and down with a small number of incidences. So it's probably – I'm not sure of the numbers, but I would expect that data to jump up and down a fair bit.

PN396

Yes. Could you turn back to page 134?---Yes.

PN397

See if you can assist us that the chart figure 4.3, number of days lost away from work only per lost time injury/disease, again, we have some lines there for coal. So we're talking here, are we not, about Queensland between 2011 and 2016?---Yes.

PN398

This chart doesn't tell us, does it, the impact of people who are off work for more than 26 weeks. It doesn't tell us that, does it? It's simply an overall number of days of all people who are off work?---I think it's an average, is it not? I - - -

PN399

I'm sorry, it's the number of days lost away from work per LTI?---LTI, yes.

PN400

So you're giving us an average of those off work?---Yes.

PN401

But to the extent to which that average is affected – sorry, I withdraw that. To the extent to which these figures assist to understand whether there's any change we're not finding here suggestions that there is significant change over the last five years, and the number of days that people are off work as a result of injury in the coal areas?---No, it's fairly flat in Queensland over that five year period.

PN402

Now with respect to New South Wales you will have seen that Mr Vickers put on a substantial statement which included a New South Wales Mine Safety Performance Report for 2015/16. Do you recall that?---I do recall it.

PN403

It's a very substantial statement. So what we've done is - - -?---Mr Vickers' statements always are very substantial.

PN404

- - -just extracted one of the annexures. I hope the Commission – we didn't make multiple copies of this. It's annexure 38 to Mr Vickers; the Mine Safety Performance Report. I'm showing the witness just the annexure 38, and can I ask you to turn to page 528 in the bottom right-hand corner. That's the page number of Mr Vickers' statement. It's also page 35 of the performance report. So this is page 528. Just tell me when you've got to page 528?---Yes.

PN405

So here we're dealing with New South Wales data, are we not?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN406

Again, the different industries are separated out of serious bodily injuries by sector, and we have here a number of serious bodily injuries, and coal surface and coal underground are the bottom two?---Mm-hm.

PN407

While the numbers bounce around a little from year to year, the position appears to be, is it not, that the serious bodily injuries by sector are not changing significantly between 2006 and 2015/16 when one combine coal surface and coal underground?---That seems to be the case. I'm not sure what a serious – what the definition of a serious bodily injury is, but, yes, to the extent that that – yes, that's what the graph shows.

PN408

Thank you. Can I take you back to your first statement at para 35. I just want to ask you a question about the chart there. Just tell me when you have paragraph 35 open?---Hang on. Let me just find where I am. Yes.

PN409

This is some Queensland data that you've prepared in a graph form. Just so we understand it it's lost time injury, frequency rate per million hours worked. Is this recording the number of times per million hours worked that someone has had at least one hour of lost time?---I'd have to go to the definitions in the Queensland report to confirm whether it's an hour, but it's a lost time injury; sometimes considered to be a day; sometimes an hour. I'm not sure exactly which they used.

PN410

Do you accept this; that what one doesn't learn from this chart is the extent to which – or where there's been any change in the number of incidents where someone is injured and as a result of that injury is off work for more than 26 weeks?---That's correct.

PN411

Do I take it that you don't have any information as to why the data appears to be, in respect to 2010/11, quite different to the previous two years for coal underground; why it's volatile?---No.

PN412

At paragraph 27 of your first statement, and just go back a couple of pages. At this point you are summarising raw data that was obtained from CMI; is that right?---That's correct.

PN413

This particular data that you are summarising here, claims per thousand exposed to risk - - -?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN414

- - -do you understand what exposed to risk means in this chart?---It's the phrase that CMI used to indicate anyone who is insured and who's covered by their insurance. They call them people who are exposed to risk in the industry. That's the phrase that is commonly used.

PN415

They separately provided you with information about accident payments per thousand exposed to risk, didn't they, in a separate piece of data?---Yes, I think so. Yes.

PN416

That led to your chart in par 31?---Yes.

PN417

So, firstly, do you accept that to the extent to which you are getting data from CMI it's more useful to be looking at, or more relevant to this proceeding, to be looking at claims that give rise to accident payments than simply claims that have given rise to a workers' compensation claim?---Yes.

PN418

When you looked at the data that gives rise to the table in both tables, 27 and 31, in both cases one of the things you did was take the numbers that CMI told you were exposed to risk that you've just said are those who are insured?---Yes.

PN419

Did you look at that and identify that there seemed to be some very substantial year to year changes that might lead you to question the validity of the data?---No, I didn't.

PN420

So the data itself is annexed to your statement. So can I take you to page 180? This is the data set which you used to determine those – or the first source of data for the exposed to risk category; is that right?---Yes.

PN421

So let's just look at the change from 2010/11 to 2011/12. You see there that the numbers insured jumped from 23,000 to 30,000. Given your knowledge of the industry is it likely that the number of employees in New South Wales jumped by something like 30 per cent in a single financial year?---That seems extreme. What may have happened is that a group of employees who perhaps should have been insured through CMI and weren't previously were captured by CMI at that time. There's often discussions between CMI and employers as to where the insurance should be held. These are contract employees in particular.

PN422

I see. If we just go to a broader comparison, see in 2003/4 the number is a little under 11,000, and eight years later it is now something that's approaching three times that number. Do you accept that, given your knowledge of the industry, that there wasn't a 300 per cent increase in the numbers employed in the coal mining industry in that eight year period?---It seems unlikely, but I don't know. That's not a figure I've researched.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN423

Any issue with the starting point of the number of people who are exposed to risk is going to necessarily affect your tables, is it not, because you started with that

number and then divided the other data into it?---Yes, except the information that I've got from CMI is about the people who they considered were insured by them. So even if there was something unusual happening about how many people were covered or not, the ratio of claims to numbers of people would still be consistent.

PN424

I see. You don't think having this being drawn to your attention that there's some now question that must arise in your mind as to whether the data that you've summarised is actually valid and for this Commission to be able to rely on?---It's the best data which I could obtain.

PN425

If you answer my question, it might be the best data you were able to obtain, but that doesn't make it good. Do you accept that having drawn this to your attention that this data has got problems that would lead some person not to place any significant weight on it?---No, I don't accept that.

PN426

Can we go back to your statement wherein you've summarised where you dealt with this table, the first of the two tables. I'm sorry, I'll withdraw that. Can we go to the second of the two tables; the one that actually deals with accident payments per thousand exposed to risk? There is a substantial increase between what appears to be about 1993/94, and it comes back down to in around 2005/2006 in accident payments per thousand. You have included in your paragraph 30 evidence that you asked CMI for a reason for the increase; did you not?---Yes.

PN427

In paragraph 30 you've set out what they responded by way of correspondence to you that the discrepancy noted in the data is a result of changes made to the relevant industrial instruments commencing from '94/'95?---Yes.

PN428

This is only New South Wales data; is it not?---Yes.

PN429

Are you aware of any change to the relevant industrial instruments that occurred in '94/'95?---I can't remember them. When I got this answer I looked to find, and I can't recall the detail of it. I just checked to say, yes, that makes sense now.

PN430

I see. Is there any reason why you can't now recall why it made sense? What the change was?---I just satisfied myself that the response from CMI was sensible and that I could rely on it. I didn't - - -

PN431

I see?---It didn't stick in my mind.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN432

Is there a reason why it then continues to increase in '95/'96, '97/'98?---My assumption is that the change had an impact over time, and therefore the time that

it had impact over meant that the result of the change fell into some of the subsequent financial years.

PN433

Then when you say that's an assumption, you can't now recall what the change was, so are you actually – is that something closer to a speculation at this point?---No. I recall the same – I recall having the same question in my mind at the time; why wasn't it simply a straight up and down discontinuous change, and that was the view I came to at the time.

PN434

Then it then disappears off a cliff once we get to the top of this mountain. Do you recall why that change occurs? There's no suggestion of another unknown change from an industrial instrument?---Well, that was - - -

PN435

Did you ask that question?---No. That's over a period of some 10 years, and - - -

PN436

Yes?--- - - -is, I think, simply a reflection of reduction in the number of accident payments per 1000 people exposed to risk.

PN437

You don't recall asking the question as to why, having gone up over a period of about six years, then it decreased at a similar pace through to 2004. You just don't know?---No. I remember at the time looking at it and thinking to myself that if you look at the number of claims per 1000 exposed to risk, and look at the decline over that period of time, and if you take out – if you tried to somehow normalise that lump in the accident payments, you're looking at the same sort of steady decline over time.

PN438

But when you say "steady decline", I know I'm just showing you what you've done but it appears to be quite a rapid decline, and then levels out at about 2005/6?---Yes.

PN439

So do you accept that from the data you've seen as – we're talking about overall accident payments per thousand. There's been little change of significance since about 2005/6?---That's correct.

PN440

This data though again is not telling us whether there have been changes in the number of people who have sought accident pay for more than 26 weeks, is it?---Not in that piece of data, no.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN441

No. That led you to ask CMI for some more information; did it not?---I think I'd already asked for the information. I needed to ask them to correct their response because their response had made an assumption which I had not intended.

PN442

I see. So you did get from them data which allowed you to understand over time any changes in the length of period that people were claiming accident pay; did you not?---I think so.

PN443

Should we have a look at DG9, which you summarise in your second statement, which is where I'm about to go to?---Yes.

PN444

But can you just open DG9 and the Commission might wish to open it too. It's at page 186 of the first statement, and DG9 – Mr Gunzburg, can you just follow this and make sure I've got this right?---Yes.

PN445

DG9 starts at – well, the cover page is 185, but it's a set of pages that run through to 198; is that right?---Yes. I think that's right.

PN446

And the raw data which records the number of claims of those claiming accident pay for 0-26 weeks and then thereafter for more than 26 weeks that you summarise in your second statement is the data which you have annexed at 195 through to 198?---Yes. I think actually the summary is in the first statement, Mr Taylor, rather than the second one.

PN447

Let's just have a look at that. If you open your second statement?---Yes.

PN448

I'm not trying to mislead you?---Yes, that's - - -

PN449

But I think there is a summary in your second statement; is there not? You certainly refer to DG9 in your first statement, but I don't know if you summarise it. But by the by let's go to the second statement?---I'm sorry. I'm sorry, yes, I'm getting confused between the two.

PN450

So you have got your second statement in front of you?---Yes. Yes.

PN451

From paragraphs 3 onwards you have summarised the data which CMI provided you at pages 195 to 198 of your first statement?---Yes.

PN452

You've done it in two ways; have you not?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN453

Firstly, a Pie chart with a percentage and secondly, following your correction to paragraph 5, you've actually got a bar chart which actually has actual numbers?---Yes.

PN454

Just looking at the first of those two charts, the Pie chart, you have recorded that the data you got from CMI told you that for the period between '95 and 2016 61 per cent of the accidents that gave rise to any accident pay gave rise to accident pay of 26 weeks or less?---Yes.

PN455

It follows, does it not, that 39 per cent of claims that gave rise to accident pay gave rise to a claim of accident pay of 27 weeks or more?---Yes.

PN456

It follows, does it not, that if this clause had been in the form it was throughout that period, 39 per cent of people injured who claimed accident pay would have received less accident pay than they in fact received?---I'm sorry, could you run that past me again?

PN457

Yes. If the award clause had been in the form that you say that your clients say - - -?---Yes. Yes.

PN458

Should it be and perhaps, if I read their submissions, should always have been correctly then 39 per cent of people who were injured and made a claim for accident pay would've received less accident pay?---I think you're correct but I'm not totally following your logic I'm afraid. Simply my confusion, I'm sorry.

PN459

In fact, what I want to suggest to you is that your figure of 61 per cent less than 26 and 30 per cent greater than 26 weeks is actually an understatement, and I want to explain to you why it is?---Certainly.

PN460

Firstly, if you go back to your raw data, the table that you have analysed shows, if you go to page 196, that for claims in 2016 there are no recorded instances of someone having accident pay of more than 40 weeks. Not a single one. They're all zeros. Do you accept that?---Yes.

PN461

If you go to 2015 you will see that the number of people with a claim of up to 78 weeks, so page 198, the second to last row, 2015 you'll see that there's a big drop between 2014 and '15 of those who are 78 weeks. Do you see that?---The 78 week column.

PN462

Do you see it's gone from 34 in 2014 to five in 2015?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN463

Now looking at this did you notice that at the time; that there's not a single person with more than 52 weeks in 2016?---Yes.

PN464

And not a single – and only five people for 2015 with 78 weeks?---Yes.

PN465

Did you work out why that was?---I think it's simply a case of when you add 52 weeks to a particular date you run out at a certain time which is probably when this report was produced, so clearly there could be some people who had not reached 78 weeks at that stage who will eventually reach that but I couldn't - - -

PN466

Yes?---So you alter the figures to try and make some assumption about that.

PN467

No, but you - - -

PN468

DEPUTY PRESIDENT KOVACIC: That might be an explanation for the 2016 numbers but not necessarily for 2015 though, would it?---I'm not sure when these numbers were run exactly, but it could've been an accident which occurred at the end of 2015. That - - -

PN469

MR TAYLOR: But what - - -

PN470

DEPUTY PRESIDENT KOVACIC: I get that?---Yes. Yes.

PN471

I accept the proposition in terms of if it's a slow 2015 it might affect the numbers in 2016, but one would've thought 2015 probably would've picked up any flow over, if I can use that term?---I'm not sure exactly when the numbers were run in their system. It could've been possible to redo the graph leaving out 2015 and 2016 entirely but that would've left out the earlier ones as well. I simply graphed the table. I didn't try and change the table.

PN472

MR TAYLOR: No. You didn't explain, did you, that by simply replicating the table the Pie chart would – both charts actually were failing to record in 2015 and '16 injuries of more than 52 weeks which would eventually be picked up once people injured in those years had got to that level of injury. Sorry, that wasn't very clear?---I understand you. All I said was that is a graphical representation of the data which was provided to me.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN473

Yes. I think what you – what I want to suggest to you is that the true position is because you have included data for 2015 and '16 which is not yet picking up

people injured in those periods who are off work for more than 52 weeks, the effect of that means the Pie chart at the top of page 2, once that effect is brought in, will actually show a greater than 39 per cent will in fact be injured for more than 26 weeks?---The Pie chart is meant to represent the table of information I was given, and that's all.

PN474

Yes. Just so we understand what the table is, it's showing, in respect of each year when a person was injured - - -?---Yes.

PN475

So the year in question is the year that they were injured; is that right?---Yes.

PN476

Then you have charted how many weeks that person injured in that year was paid accident pay?---Well, that's – no, I think that's the answer to the – when I asked the question first I asked, perhaps unwisely, "Could you tell me the length of accident pay in each year?" and the number stopped at 52 weeks because it was – they literally said, "We've only paid 52 weeks accident pay this year". So I went back and asked, "No, what I meant was for each year the accidents which took place in that year, how long was the accident payment for?" so it could go up to 78 weeks.

PN477

Yes. That's the data that's at pages 195 to 198?---Yes. Yes.

PN478

So I'm not sure if you are disagreeing with my earlier answer, but I'm happy to accept what you've just explained as the way it works. So when one then turns to the second chart and one sees albeit it's relatively small one sees for those who are 53 to 78, purple, and blue, 78 or more, one sees none of those in 2016. That's simply a reflection of the fact that anyone injured in 2016 won't have been given accident pay for 52 weeks by that stage?---Yes, that's correct.

PN479

Similarly any decrease in 2015 that might be recorded from 26 weeks onwards is going to be affected by the – sorry, I'll withdraw that – the 52 weeks onwards is going to be affected by the same date issue; is it not?---Certainly towards the end of the 78 period. That's my expectation. Fifty-two weeks shouldn't be a problem.

PN480

That depends. Can you recall the date, the cut-off date, of this data?---No, as I said earlier, I can't recall exactly. Mr Taylor, I'm happy to - - -

PN481

No, I'm just – it wasn't a trick question?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN482

I was just – I couldn't – I had been told what the date was but I hadn't found it, but both Mr Shariff and Mr Fagir are helpfully helping me in that regard. Can you see at page 195 that the heading of each of the tables has a date?---Yes. Yes. Yes.

PN483

Including November, 2016?---Yes.

PN484

So that date is going to affect people who are injured in 2015. They're not going to be picked up of more than 52 weeks unless they were injured at the very beginning of 2015?---Well, any more before 30 November 2015.

PN485

The number of weeks that people are off work, do you understand this, it's not necessarily consecutive?---Yes, that can occasionally happen, yes.

PN486

Someone can be off work with a serious injury for 13 weeks, and then go back to work on partial duties only to find that they need an operation and they're off work again. That happens; does it not?---It does, and I know there's sometimes some confusion about whether that's a separate claim or not, so, yes, there are some difficulties with getting those numbers, correct.

PN487

These periods of weeks are periods of weeks off work; not periods from the date that the person was injured?---These are actually periods of – hang on, length of accident pay.

PN488

Yes?---So if accident pay was still taking place during that period, it would be continuous. Now, I'm - - -

PN489

One only gets accident pay when one isn't at work. Do you accept that?---I'm not sure of what the situation is if you return to work on light duties and are only working two or three days of the week. I'm not sure.

PN490

All right. If you're not sure I'll move on. Just going to your table on page 2 of your second statement where you're charting the length of accident pay; this is numbers now; the number of people who claimed accident pay for, in the first case, less than 26 weeks. Just looking at that, do you see a very substantial drop between what appears to be 2003 financial year and 2004 financial year?---I think it's 2004 and 2005.

PN491

I think that may well be right?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN492

Do you recall asking questions as to why that occurred?---No, I think that relates to the same question of – which was answered in respect to why the previous accident payments per 1000 exposed to risk jumps at the – around the same period; that it's the change which took place to – where the accident pay extended prior – yes, I'm sorry, I'm getting myself confused. I think it relates to the same matter, in other words, the change in how accident pay was paid at the time.

PN493

Are you referring to the evidence you gave earlier about a change to some industrial instrument you can't now recall in 1994/95?---Yes. Well – yes.

PN494

Right?---Sorry – no, I'm sorry, I'm getting confused. No, I have no explanation for that change.

PN495

You didn't ask for an explanation from CMI then, follows from what you've just said?---No.

PN496

In respect of those who receive accident pay for more than 26 weeks whilst perhaps it's a little hard to tell from figure 2, you know, don't you, that between the period of about 2003 through to 2014 there's very little change. It's basically stable; is it not?---It goes – well, if you go to page 195 - - -

PN497

Yes?---it's probably easier to read that off the chart itself.

PN498

Yes. But you haven't given us the totals. I'm looking at page 195 now?---Yes.

PN499

Thank you. You haven't totalled the numbers for each year between 27 and 39 in your statement but you have graphed it in figure 2?---That's correct.

PN500

For the benefit of the Commission I have, so for 2003 the total number between 27 and 39 is 14. You can accept that. But I just ask you to accept it. Two thousand and four it's 14; 2005 it's nine; 2005 it's 15. So we're around 14, 14, nine, 15. If you look at the last years, putting aside 2016, which is, of course, affected by the issue that we raised earlier, we're looking at figures of 21, 24, 19, 19, 17. We're not seeing, are we, any change? It's the numbers of people who are making accident pay claims in New South Wales through that period are staying relatively stable between 27 and 39 weeks?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN501

Nothing that's changed in respect of the way in which people are injured – I'll withdraw that. This application is not, in any way, brought because of any change in the numbers who are making accident pay claims?---The applications – well, I'll allow my advocate to say why the application is being made. Of note, when

considering it is, one of the issues at least, is whether the level of accidents and accident pay have remained stable since the last 20 years, 25 years when this, as I understand it, was last looked at, or whether they have reduced substantially, and the data which is provided here is meant to provide a picture of that steady reduction over a long period of time.

PN502

To the extent to which the data tells us anything about people who claim more than 26 weeks' accident pay, the data is not suggesting a steady decline. Do you accept that?---That piece of data only – it's difficult to say. There seems to be some sort of discontinuous change, as you say, at 2005. Since then, the numbers have been fairly stable.

PN503

So I come back to the question?---Mm-hm.

PN504

You, I think, told us of your involvement in the decision to bring this application?---Yes.

PN505

And I asked you about – showing you the letter that was written that you gave instructions to write in September 2015. The only impetus for that application was the decision in August 2015. Do you accept that?---That's what caused us to make the application at that time.

PN506

There's no – yes, I'll withdraw that. Thank you. Sorry, if I could just have a moment. I've asked you some questions just about the data and in particular the reliability of the data that you've summarised in your second statement on page 2, and when I say reliability, the reliability of the data for the last two years, 2015/16. Mr Fagir reminds me of one other matter. Did you make any inquiries with CMI to allow you to learn whether the data for those two years may also be affected by some delay in people reporting and making formal claims for accident pay? That there is a lag time which means that CMI not necessarily picking up claims made in the months leading up to November 2016?---I didn't make the inquiry. It's unusual for the claims not to be processed fairly quickly though, in my experience, so there's the odd one which is delayed for a particular reason, but generally it happens within a couple of months from my recollection.

PN507

Are there occasions where there are disputes which are ultimately resolved in the employee's favour, which means that accident pay wasn't paid at the time but is then in effect back-paid?---I'm sure there are, yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN508

This is only, as you understand it, recording accident payments that were in fact paid. We don't know about - at least for the last year or two. There might well be accident payments that are made for that period which only occur later?---There

could be. As I've said, 2015 and 2016 figures in the table are obviously affected by those issues.

PN509

Thank you. They're my questions.

PN510

DEPUTY PRESIDENT KOVACIC: No questions?

PN511

MR SHARIFF: No questions.

PN512

DEPUTY PRESIDENT KOVACIC: Thank you. Thank you, Mr Gunzburg, you're now excused and you're free to go.

<THE WITNESS WITHDREW

[12.50 PM]

PN513

DEPUTY PRESIDENT KOVACIC: Can I suggest we might just take a five minute break?

PN514

MR SHARIFF: Yes.

PN515

DEPUTY PRESIDENT KOVACIC: Then we'll come back and deal with the issue of objections to the other evidence.

PN516

MR SHARIFF: Yes.

PN517

DEPUTY PRESIDENT KOVACIC: That's the only other issue the Full Bench needs to deal with today?

PN518

MR SHARIFF: That's the only other issue.

PN519

DEPUTY PRESIDENT KOVACIC: Yes. So we'll resume at five to one.

SHORT ADJOURNMENT

[12.50 PM]

RESUMED

[12.59 PM]

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN520

DEPUTY PRESIDENT KOVACIC: Just before you start, Mr Shariff, there's just one issue that I think emerges from Mr Taylor's cross-examination of Mr Gunzburg, and I might characterise it as to what goes to the issue of the 18(2)(a),

(2)(b) when the threshold is, and it would be of assistance to the Bench if the parties were able to confer perhaps with a view to developing an agreed statement of facts, and that is in respect of those other awards that provide for accident pay the basis on which accident pay is paid, and to be a little bit more explicit it's really whether it's premised, as in this award, the period of paid personal leave, or whether it's premised on the employees' base rate of pay of whatever it might be, because that may be a relevant consideration should the Bench ultimately determine that the quantum of accident pay is to be reduced to 52. A consideration that flows from that is whether there's a need for consistency in which the basis of the payment, and I'm not pre-empting anything there, but that aspect is, I don't think, something that's canvassed in the submissions, as I've interpreted them, but it might be of assistance to the Bench.

PN521

MR SHARIFF: Yes. No, I gathered that based on two things that my friend raised as part of his theory in cross-examination; (1) I think I raised that if there's some alternative - - -

PN522

DEPUTY PRESIDENT KOVACIC: Yes.

PN523

MR SHARIFF: Of course the Commission is not bound by our application - - -

PN524

DEPUTY PRESIDENT KOVACIC: Yes.

PN525

MR SHARIFF: And we would need to give the Commission assistance on that.

PN526

DEPUTY PRESIDENT KOVACIC: Yes.

PN527

MR SHARIFF: We're happy to confer and propose that.

PN528

DEPUTY PRESIDENT KOVACIC: Yes, all right.

PN529

MR SHARIFF: The second is in relation to raw data we will, as it was emerging, we're happy to reproduce the data sets. It doesn't really need a witness to reproduce data sets, but we can reproduce a graphical representation of that or perhaps just the tally numbers, the way Mr Taylor had done for particular years for in excess of 27 weeks, we can do that and provide that in advance of the next occasion.

PN530

DEPUTY PRESIDENT KOVACIC: Yes.

PN531

MR SHARIFF: If that can be done by agreement we'll endeavour to do that.

PN532

DEPUTY PRESIDENT KOVACIC: It was a thought that crossed my mind given, I think, that the data that was the subject of cross-examination at the tail end was produced by CMI, I think, in January of this year, there's been a bit of water under the bridge since then, so it may be able to be updated and address some of the issues that were raised by Mr Taylor.

PN533

MR SHARIFF: Just on a production issue, I think I'd overstated the position on instructions on what had happened with production in this matter. I was going to return to. I accept what Mr Taylor says about that.

PN534

DEPUTY PRESIDENT KOVACIC: Sure, thank you.

PN535

MR SHARIFF: But we are also happy to approach CMI to see whether there's further data that's now available for the '15/'16 years.

PN536

DEPUTY PRESIDENT KOVACIC: Yes.

PN537

MR SHARIFF: The difficulty we'll have, I think, is the one that Mr Taylor identified, which is that CMI will be very reluctant to produce that data without an order of production from the Commission. But if that can be an agreed process we will attend to that.

PN538

DEPUTY PRESIDENT KOVACIC: I should also indicate in both of those sorts of data is if the parties are of a view that they think that they'd like the opportunity to provide further submissions on either of any additional data that might be provided by CMI, you're at liberty to approach the Commission in terms of, you know - - -

PN539

MR SHARIFF: We just don't want to be met with any contention that we've brought our case, we've produced the evidence, and the evidence is closed. I mean, in the nature of these things, if we seek further production of documents - - -

PN540

DEPUTY PRESIDENT KOVACIC: And equally from – and I again speak from my perspective, I don't want to see either of the parties feel as though they're ambushed, if I can put it that way, in terms of the data.

PN541

MR SHARIFF: No, no, I accept that. I have produced a schedule of the objections we take to the three, I think, it's three statements relied upon by the unions. Having responded to the objections that Mr Taylor raised this morning and the ruling that your Honours have made in relation to that, I'd accept that my

objections would very much fall into in large measure the same category. If they're matters that can be addressed in weight we'll address them in weight. I don't wish to be heard any further on those objections, but if my friend wishes to say something about them it's a matter for him.

PN542

DEPUTY PRESIDENT KOVACIC: Mr Taylor?

PN543

MR TAYLOR: No, I think my friend is quite right to identify that the Bench would no doubt take the same approach to these objections that you took to ours.

PN544

MR SHARIFF: I should just correct one thing. The first objection on page 7 should be the paragraph 17; not 22.

PN545

DEPUTY PRESIDENT KOVACIC: Paragraph? Sorry, seven?

PN546

MR SHARIFF: Seventeen.

PN547

DEPUTY PRESIDENT KOVACIC: Mr Shariff, we will deal with it on the same basis as we dealt with the objections to aspects of Mr Gunzburg's evidence so it'll be a matter of submissions as to the weight that's attached to any of the material that might be disputed today. I think that probably concludes the proceedings for today.

PN548

MR SHARIFF: Yes.

PN549

DEPUTY PRESIDENT KOVACIC: So I thank you for your assistance and - - -

PN550

MR SHARIFF: I'm sorry.

PN551

DEPUTY PRESIDENT KOVACIC: Yes?

PN552

MR SHARIFF: I should indicate that the matter about which Commissioner Bull raised a question with me.

PN553

DEPUTY PRESIDENT KOVACIC: It's Deputy President by the way.

PN554

MR SHARIFF: I'm sorry. I do apologise, sir.

PN555

DEPUTY PRESIDENT BULL: I've been called Deputy Commissioner, so you've given me a promotion.

PN556

MR SHARIFF: Yes. I do apologise. We can attend to clarify those matters by way of potentially a supplementary statement to identify the particular entities. I should note that my friend cross-examined Mr Gunzburg on exhibit 3.

PN557

DEPUTY PRESIDENT KOVACIC: I think it's exhibit 3.

PN558

MR SHARIFF: Which has the list of entities. There's one further entity, New Hope. That's part of the CMIEG. We will identify that in the supplementary statement, and we'll seek to identify as best we can the proportion of the black coal mining industry that's covered by those 14 companies.

PN559

DEPUTY PRESIDENT KOVACIC: Thank you. Sorry, Mr - - -

PN560

MR TAYLOR: Before we rise would it be convenient to formally receive into evidence the union evidence in circumstances where they're not required for cross-examination?

PN561

DEPUTY PRESIDENT KOVACIC: Yes. Good point, Mr Taylor.

PN562

MR TAYLOR: I'm content for your Honour to receive it in the order that's most convenient to you and what comes to hand, although using my friend's table, if the Commission would start with the first statement of Andrew Vickers dated 28 June 2017.

PN563

DEPUTY PRESIDENT KOVACIC: I'll mark that as exhibit 5.

**EXHIBIT #5 WITNESS STATEMENT OF ANDREW VICKERS
DATED 28/06/2017**

PN564

MR TAYLOR: And we filed a supplementary statement, 27 September 2017.

PN565

DEPUTY PRESIDENT KOVACIC: That will be exhibit 6.

**EXHIBIT #6 SUPPLEMENTARY WITNESS STATEMENT OF
ANDREW VICKERS DATED 27/09/2017**

PN566

MR TAYLOR: There is a statement of Catherine Bolger dated 30 June 2017.

PN567

DEPUTY PRESIDENT KOVACIC: I'll mark that as exhibit 7.

**EXHIBIT #7 WITNESS STATEMENT OF CATHERINE BOLGER
DATED 30/06/2017**

PN568

MR TAYLOR: And finally a statement of David Sim, S-i-m, dated 8 June, 2017.

PN569

DEPUTY PRESIDENT KOVACIC: I'll mark that as exhibit 8.

**EXHIBIT #8 WITNESS STATEMENT OF DAVID SIM DATED
08/06/2017**

PN570

MR TAYLOR: If it pleases.

PN571

DEPUTY PRESIDENT KOVACIC: Thank you. That concludes today's proceedings. We'll see you all on 24 November.

ADJOURNED UNTIL FRIDAY, 24 NOVEMBER 2017

[1.07 PM]

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